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NO. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORMAN J. STRICOF,
Petitioner,
v.
LORRAINE C. STRICOF,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

Attorneys for Petitioner

BRUCE T. LEITMAN
1263 W. Square Lake Road
Bloomfield Hills, Michigan 48013
Phone: 1-(313) 338-4501

GARY GOODFRIEND
17117 W. Nine Mile Rd., Suite 536
Southfield, Michigan 48075
Phone: 1-(313) 559-9797

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
962-8745 962-8746

QUESTIONS PRESENTED

I.

WHETHER THE CHARACTERIZATION OF PROPERTY DIVISION PAYMENTS AS "ALIMONY" IN A MICHIGAN DIVORCE DECREE PROPERLY QUALIFIES THOSE PAYMENTS AS ALIMONY (WHICH IS DEDUCTIBLE FROM THE INCOME OF THE HUSBAND AND INCLUDIBLE IN THE INCOME OF THE WIFE) WITHIN THE MEANING OF 26 U.S.C. § 71(a) AND (c)?

II.

WHETHER A PROVISION IN THE PROPERTY DIVISION OF A MICHIGAN DIVORCE COURT DECREE STATING THAT THE RECIPIENT OF AN INTEREST IN APPRECIATED PROPERTY INCURS A FEDERAL INCOME TAX LIABILITY UPON THE TRANSFER OF PROPERTY CONFLICTS WITH THIS COURT'S INTERPRETATION OF 26 U.S.C. § 1001(a), AS SET FORTH IN *UNITED STATES* V. *DAVIS*, 370 US 65 (1962)?

III.

WHETHER THE ADVERSE TAX CONSEQUENCES ADHERING TO THE ASSETS AWARDED TO PETITIONER WERE SO "SPECULATIVE AND IMAGINARY" SO AS TO BE IGNORED BY THE COURT WHEN IT DETERMINED THE APPROPRIATE WORTH OF PETITIONER'S SHARE OF THE MARITAL ESTATE?

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OPINIONS BELOW

The March 12, 1976 Judgment of Divorce of the Oakland County Circuit Court (Michigan) is reproduced in the Appendix at 7a, *infra*. The March 12, 1976 Findings of the state trial judge are reproduced in the Appendix at 18a, *infra*. The January 25, 1978 Opinion of the Michigan Court of Appeals is unpublished. It is, however, reproduced in the Appendix at 34a, *infra*. The August 9, 1979 Post-Remand Findings and Conclusions of the Trial Judge is unpublished, but is reproduced in the Appendix at 42a, *infra*. The March 7, 1979 Opinion of the Michigan Court of Appeals is unpublished, and is reproduced in the Appendix at 51a, *infra*.

The April 4, 1980 Order of the Michigan Supreme Court denying Petitioner Discretionary Leave to Appeal is published at 408 Mich 886 (1980). For convenience, it is reproduced in the Appendix at 57a, *infra*. The Order of Mr. Justice Stewart, extending Petitioner's time in which to file this Petition for Certiorari to September 1, 1980, is reproduced at 59a of the Appendix, *infra*.

JURISDICTION

The order of the Michigan Supreme Court denying discretionary leave to appeal was entered on April 4, 1980 (57a). The Honorable Potter Stewart, sitting as circuit justice, entered an order on June 25, 1980, extending Petitioner's time for filing his Petition for Certiorari an additional sixty (60) days (59a). The petition for a writ of certiorari has been filed within the allotted one hundred fifty (150) days. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

The three (3) statutes of the Internal Revenue Code here involved are:

1. 26 U.S.C. § 71(a)(1) — If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes *periodic payments* (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation

which, because of *the marital or family relationship*, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation. (Emphasis added.)

26 U.S.C. § 71(c)(1) and (2) — "(1) General rule. For purposes of subsection (a), installment payments discharging a part of an obligation the principal sum of which is, either in terms of money or property, specified in the decree, instrument, or agreement shall not be treated as periodic payments," and "(2) Where period for payment is more than 10 years. If, by the term of the decree, instrument, or agreement, the principal sum referred to in paragraph (1) is to be paid or may be paid over a period ending more than 10 years from the date of such decree, instrument, or agreement, then (notwithstanding paragraph (1)) the installment payments shall be treated as periodic payments for purposes of subsection (a), but (in the case of any one taxable year of the wife) only to the extent of 10 percent of the principal sum. For purposes of the preceding sentence, the part of any principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be treated as an installment payment for the taxable year in which it is received."

2. 26 U.S.C. § 215(a) — In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. No deduction shall be allowed under the

preceding sentence with respect to any payment if, by reason of section 71(d) or 682, the amount thereof is not includible in the husband's gross income.

3. 26 U.S.C. § 1001 — The gain from the *sale or other disposition of property* shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized. (Emphasis added.)

STATEMENT OF THE CASE

NORMAN J. STRICOF, the Petitioner herein, instituted divorce proceedings in the Oakland County (Michigan) Circuit Court against his (then) wife, LORRAINE C. STRICOF, the Respondent herein. The case was governed by Michigan's so-called "no fault" divorce statute.[1] Trial focused upon the proper evaluation of the marital estate, what constituted a reasonable division of the parties' assets, and whether the Respondent would receive alimony.[2]

On March 12, 1976, the trial court entered judgment granting an absolute divorce between the parties (7a). Petitioner was ordered to pay Respondent alimony in the amount of Three Thousand ($3,000) Dollars per

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[1] Mich. Comp. Laws § 552.6; Mich. Stat. Ann. § 25.86.

[2] Under Michigan divorce law, there is to be a ". . . just and reasonable . . ." property settlement. Mich. Comp. Laws § 552.19; Mich Stat. Ann. § 25.99

month (14a-15a). Respondent was further awarded assets having a value in excess of one-half of One Million Dollars. These transferred properties included, *inter alia*, a marital residence, marketable stocks, bonds, partnership interests, and proceeds from other partnership and corporate investments (8a-11a).

Sub-paragraphs B, C, and G of Article III of the Judgment of Divorce, entitled *"PROPERTY SETTLEMENT,"* stated, *inter alia*, as follows:

> "B. IT IS FURTHER ORDERED AND ADJUDGED that defendant wife shall receive as her sole and separate property 50% of the amounts paid to plaintiff husband from or on account of plaintiff husband's 27-1/2% interest in Frenchtown Convalescent Center, Inc., a Michigan corporation, and its related entity, FCC Properties, a Michigan co-partnership.
>
> "The intent of the foregoing language is to award defendant wife fifty percent (50%) of the amount received or benefited to plaintiff husband from payments of principal, capital, income or otherwise, including any amount received by plaintiff husband upon a sale or other diminution of his interest therein, with a maximum limit of $135,000.00 to be paid to defendant wife under this provision.
>
> * * *

"The amounts so received by defendant wife shall be alimony taxable to her and deductible by plaintiff husband.

* * *

"C. IT IS FURTHER ORDERED AND ADJUDGED that defendant wife shall receive as her sole and separate property 50% of the amounts paid to plaintiff husband, from or on account of plaintiff husband's 20% interest in Van Buren Convalescent Center, Inc., and in Van Buren properties (a co-partnership).

"The intent of the foregoing language is to award defendant wife 50% of the amount received or benefited to the plaintiff husband by way of principal, capital, income or otherwise, including any amounts received by plaintiff husband upon a sale or other diminution of his interest therein with a maximum of $170,000.00 to be paid to defendant wife under this provision.

* * *

"The amounts so received by wife shall be alimony and taxable to her and deductible by plaintiff husband and shall not terminate as a result of death or remarriage."

"G. IT IS FURTHER ORDERED AND ADJUDGED that each party hereto shall be responsible for his and her own tax liability incurred by reason of this property settlement on the property received." (11a)

When Judgment was entered, the trial judge stated:

"It is the intention of the Court that both parties who receive any of the property the Court has

> indicated shall be responsible for any taxes due and owing as a result of their ownership." March 12, 1976 transcript, pg. 8.

Petitioner appealed by right to the Michigan Court of Appeals alleging, *inter alia*, that pursuant to the Internal Revenue Code, these provisions were legally insufficient to make the Respondent-transferee responsible for tax liabilities on property which she received, irrespective of the contrary intention expressed in the state court judgment.

On January 25, 1978, the appellate court remanded the case to the trial court to answer ten (10) specific questions, including:

> "Can the trial court properly term the property settlement alimony?" (38a)

Pursuant to this remand, on August 2, 1978 the trial court heard oral argument. In an August 9, 1978 opinion, the trial judge reaffirmed the original Judgment of Divorce in its entirety (42a). The trial judge termed the federal income tax liabilities "speculative, imaginary tax consequences." (44a)

On Appeal after remand, on March 7, 1979, the Michigan Court of Appeals affirmed all aspects of the Judgment of Divorce, except for a provision involving payment of attorney fees (51a). Speaking to the trial court's treatment of tax incidences, the Michigan Court of Appeals said:

> "Finally, the trial court stated that the general principle which had guided the trial court's division was that each party should be responsible for his or her own tax liabilities on property awarded in the settlement.

> "We can find no fault with the above findings. . ." (52a)

Specifically addressing Petitioner's allegations that the trial court misread this Court's decision in *United States* v *Davis*, 370 US 65 (1962), the Michigan appellate tribunal answered that the trial court "is not required to consider speculative, imaginary tax consequences of transfers which may never occur." (52a)

On March 4, 1980, the Michigan Supreme Court denied Petitioner's application for discretionary review, again with one exception. That Court remanded the case to the trial judge for reconsideration of "the matter in light of the plaintiff's clear tax liability that arises out of the undisputed fact that the nursing home properties had negative bases of $70,000 and $127,000 at the time of trial." (58a) This issue is not now before this Court.

At trial and at every level of appeal the Petitioner has vigorously advanced his arguments regarding (1) whether, pursuant to the applicable portions of the Internal Revenue Code, Petitioner could deduct as alimony the property division payments to his former spouse, (2) which party bears the federal income tax liability under *United States* v *Davis*, 370 US 65 (1962), and (3) whether the adverse tax consequences adhering to the assets awarded Petitioner were so "speculative and imaginary" so as to be ignored by the Court when it determined the appropriate worth of Petitioner's share of the marital estate.

REASONS FOR GRANTING THE WRIT

I

A.

Supreme Court Rule 17.1(a) provides, in pertinent part:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Petitioner respectfully submits that here the Michigan Courts, apparently like the courts of many other jurisdictions, erroneously decided several questions involving interpretations of provisions of the Internal Revenue Code.

Petitioner's research has found no decision from this Court which fully addresses the supremacy of the Internal Revenue Code as it impacts upon specific provisions found within state divorce decrees. Cf: *Merchant's Loan & T. Co.* v *Smietanka*, 255 US 509, 41 S.Ct. 386, 65 L.Ed. 751 (1921). As shown, *infra*, at 13-15, the federal courts of appeals as well as the Tax Court have consistently held that it is not the state trial judge's ruling that certain tax results will obtain that

determine whether the property awarded in that provision is alimony. These courts have uniformly held that an award is only "alimony" (and therefore taxable as income to the wife and deductible to the husband) if it fully satisfies the Congressional elements of 26 U.S.C. §§ 71 and 215.

However, in spite of this plethora of existing lower federal court precedent, state trial judges, like the one in this case, continue to believe that the expressed intention of the state trial judge underlying a specific award determines whether that award qualifies as alimony. Petitioner believes that it is time for this Court to speak forcefully on this question and to instruct state judges that, for income tax purposes, the denominations used in state divorce judgments, and the intention of the state trial judge, do *not* determine whether an award properly qualifies as alimony. In view of the ever increasing number of divorces in Michigan and in this country[3], a definitive holding from this Court would be extremely beneficial.

The position in which this state court judgment placed Petitioner should not escape this Court. Norman J. Stricof is caught between two existing forces: One, the state divorce judgment, tells Petitioner that he may deduct certain payments and property divisions as "alimony" because that was the express intention of the Michigan courts; the other, §§ 71 and 215 of the Internal Revenue Code, plainly mandates that Petitioner cannot deduct these payments as alimony because an award

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[3] One source notes, for example, that in 1970 the national divorce rate was 3.5 per 10.6 marriages per 1000 persons, while in 1978 that number rose remarkably to 5.1 divorces per 10.3 marriages per 1000 persons. See, U.S. Bureau of the Census, *Statistical Abstract of the United States: 1979*, pg. 60 (100th ed) Washington, D.C. (1979).

only qualifies as alimony if it satisfies the requirements of 26 U.S.C. § 71. Petitioner's argument that the language of the Internal Revenue Code was controlling as to whether an award qualifies as alimony was ignored by the Michigan courts. The dilemma confronting a taxpayer like Petitioner is substantial.[4]

Moreover, the myriad lower federal court precedent treating this question manifestly illustrates that the state divorce courts do not recognize the opinion of the federal circuit courts of appeals and the Tax Court as controlling. A decision of this Court squarely holding that the provisions of a state divorce judgment, and the concomitant intention of the state trial judge, are *not* supreme in treating matters of federal income tax would substantially reduce the flow of federal cases continually re-litigating this point.

Lastly, it is to be realized that Michigan's divorce laws are equitable in nature. Formulating property divisions and alimony awards by misapplication of governing federal tax law is hardly supportive of the concept of equity. See, *Kraunz* v *Kraunz*, 293 NY 152, 56 NE2d 90, 91-92 (1944). Erroneous state property divisions, such as this one, which totally misperceive and misapply the governing federal tax statutes result, in fact, in a grossly disparate and inequitable property division.

The legal questions which this Petition presents are substantial. Not only Mr. Stricof but all others who go

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[4] Income tax return preparers in Michigan are immersed in a similiar predicament. The Tax Reform Act of 1976 imposed significant penalties upon preparers not only for any wilful understatement of tax liability, but also for negligence. 26 U.S.C. § 6694. There are also criminal sanctions for aiding and abetting a taxpayer in a misstating any material matter on a tax return. 26 U.S.C. § 7206(2). Accordingly, this matter is of serious interest to the accounting profession, the legal profession and the State of Michigan commercial income tax return industry.

through divorce proceedings would benefit from a decision of this Court which provides clear guidance on the impact of the Internal Revenue Code on state divorce judgments. This case presents "special and important reasons" for review and plainly satisfies Rule 17.1(a). See, *Rice* v *Sioux City Memorial Park Cemetary, Inc*, 349 US 70, 99 L Ed 897, 75 S Ct 614 (1955).

B.

After awarding Respondent $3,000 per month as alimony, which was obviously framed with 26 U.S.C. §§ 71 and 215 in mind, the trial court then divided various marital assets between the parties under Article III of the Judgment of Divorce entitled "*PROPERTY SETTLEMENT.*" Sub-paragraph C of that settlement awarded the wife certain interests in various partnership and corporate investments owned by the husband, and concluded that:

> "The amount so received by the wife shall be alimony taxable to her and deductible by the plaintiff-husband and shall not terminate as a result of death or remarriage."

Further, sub-paragraph G of that Article stated:

> "G. IT IS FURTHER ORDERED AND ADJUDGED that each party hereto shall be responsible for his and her own tax liability incurred by reason of this property settlement on the property received." (14a)

In order for the alimony to be included in the taxable income of the Respondent-wife, and deductible by the Petitioner-husband, payments must be ". . . periodic

payments. . . because of the marital or family relationship . . .." See, Treas. Reg. § 1.71-1(b)(4), and S. Rep. No. 1631, 77th Cong., 2nd sess. 83 (1942), 1942-2 C. B. 504, 568, which interpreted the predecessor of present § 71 of the Internal Revenue Code of 1954— § 22(k) of the 1939 Internal Revenue Code. The trial court limited itself to the question of whether these payments met the time prescriptions of 26 U.S.C. § 71(c)(2). That is not the principal issue. The question is, for Internal Revenue Code purposes, do these payments represent a property division instead of an alimony award.

The federal judiciary has uniformly held that even if payments satisfy the periodic payments test, sometimes referred to as the ten (10) year rule, they will not be treated as alimony for purposes of 26 U.S.C. §§ 71 and 215 if they are, in substance, a disguised property settlement.

For example, addressing the ten (10) year rule, the Court of Appeals for the Sixth Circuit has observed that 26 U.S.C. § 71(a) ". . . merely mandates that definite amounts payable over more than ten years be deemed periodic and does not eliminate the requirement that the payment be in the nature of support rather than a division of property." *Lambros* v *Commissioner*, 459 F2d 69, 71 (6th Cir 1972). See, also, *Pierce* v *Commissioner*, 66 T.C. 840 (1976), Acq. 1978-1 C.B.2.; and *McCombs* v *Commissioner*, 397 F2d 4 (10th Cir 1968).

In *Pierce, supra*, as in this case, the divorce decree had denominated the payments at issue as "alimony." In disregarding that state court label, the Tax Court noted that:

> "Our determination as to whether a particular payment qualifies as section 71 alimony for

> Federal tax purposes rests on the factual circumstances of each case, and we are not at all bound by the New Jersey court's characterization of the payment in question as 'alimony.' " 66 T.C. 840, 846.

See, also, *Gammill* v *Commissioner*, 73 T.C. No. 75 (1980); *Gerlach* v *Commissioner*, 55 T.C. 156, 167 (1970); *Porter* v *Commissioner*, 388 F2d 670 (6th Cir 1968); *Taylor* v *Campbell*, 335 F2d 841, 845 (5th Cir 1964); *Mills* v *C.I.R*, 442 F2d 1149, 1151 (10th Cir 1971); *Wright* v *C.I.R.*, 543 F2d 593, 598 (7th Cir 1976); *Piel* v *C.I.R.*, 340 F2d 887 (2d Cir 1965). The *Gammill* decision declared:

> "Payments which are part of property settlement are capital in nature and, therefore, not subject to the provisions of § 71." (citations omitted) CCH Tax Court Regular Decisions, at pg. 2835.

As stated by the *Gerlach* court, the proper test to apply in determining if payments represent alimony or a division of property is to view ". . . all the surrounding facts and circumstances." 55 T.C. 156, 167. See, also, *Gammill, supra; Jackson* v *Commissioner*, 54 T.C. 125, 130 (1970).

It is manifest that the payments under Article III of the instant *"PROPERTY SETTLEMENT"* represent a property division rather than an obligation arising out of "the marital or family relationship," i.e., alimony. First, these payments were placed within the *"PROPERTY SETTLEMENT"* portion of the Judgment.[5]

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[5] The trial judge was consistent. From the bench, he was explicit in treating the bifurcation of these interests as part of the property settlement in spite of his repeated declarations that these monies were to be tax deductible to Petitioner. See, March 12, 1976 transcript, pp. 4, 6, 7, 8 and 10.

Second, in language that was obviously phrased with 26 U.S.C. § 71(a) in mind, the Judgment of Divorce elsewhere specifically provides for alimony in the amount of $3,000 per month. Third, and most importantly, is the nature of the payments themselves. Article III payments are not a set amount for a defined period of time. Rather, they constitute, up to a maximum dollar amount, one-half of the proceeds the husband would receive from certain partnership interests and corporate investments. Applying the "facts and circumstances" test to this case, it is beyond argument that the monies required to be paid by the Petitioner under the *"PROPERTY SETTLEMENT"* provisions of the Judgment of Divorce are not alimony payments within the meaning of 26 U.S.C. § 71(a).

But assuming, *arguendo*, that the payments arose out of the marital or family relationship, this provision still does not qualify as deductible alimony because it does not meet the statute's "periodic payment" test.

"Alimony" must meet certain statutory criteria, one of which is that it takes the form of payments for "more than 10 years." 26 U.S.C. § 71(c). In the alternative, an award for less than ten (10) years qualifies as deductible alimony *only* if "(a) Such payments are subject to any one or more of the contingencies of death of either spouse, remarriage of the wife, or change in the economic status of either spouse, and (b) Such payments are in the nature of alimony or an allowance for support." Treas. Reg. § 1.71-1(d)(3)(i)(a) and (b). None of these contingencies was included within these provisions. Therefore, the only way in which these payments can properly be considered as alimony for federal income purposes is if they can be deemed to be periodic payments for more than ten (10) years.

But in this case, as the trial court so clearly stated:

> "the period which the payments must be made is *indefinite; it is neither more than, nor less than, ten years*. Thus, the payments fit the statutory definition and should be treated for tax purposes as alimony." (Emphasis Supplied) (Tr August 11, 1978).

This portion of the Judgment of Divorce plaintly does not provide for Respondent-wife to receive periodic payments for more than ten (10) years. It is manifest, therefore, that her federal income tax liabilities from receipt of over one-half million dollars will not result in the federal income tax consequences envisioned by the state court.

These issues — (1) alimony versus property settlement, and (2) periodic payment — are two of the most frequently litigated questions in tax law. See, for recent example, *Gammill, supra; Crouser* v *Commissioner*, 73 T.C. No. 89 (March 18, 1980); and *Siragusa* v *Commissioner*, 39 T.C.M. 1196 (March 10, 1980). Their consistent re-occurrence and the plain congressional intention that there be uniformity of tax treatment for situations arising in the several states, *C.I.R.* v *Lester*, 366 US 299, 81 S Ct 1343, 6 L Ed 2d 306 (1961); *Bardwell* v *C.I.R.*, 318 F2d 786, 789 (1963); S. Rep. No. 1631, 77th Cong, 2d sess. 83 (1942); H. R. Rep. No. 2333, 77th Cong, 2d sess. 72 (1942), suggests that this is a most appropriate case in which to grant certiorari.

II

In formulating the instant property division the trial court made the following statement which was accepted, *sub silencio*, on appeal.

> "It is the intention of the Court that both parties who receive any of the property the Court has

> indicated shall be responsible for any taxes due and owing as a result of their ownership." (22a)

It is thus obvious that the Michigan Courts proceeded upon the erroneous assumption that the federal income tax liabilities fell upon the recipient of the transferred property (Respondent), rather than on the transferor spouse (Petitioner).

But the very clear construction of 26 U.S.C. § 1001(a) set forth in this Court's decision in *United States* v *Davis*, 370 US 65 (1962), teaches that a divorce related transfer, like the transfer of the Petitioner's interest in the $75,000 marital home to Respondent in this case, is a ". . . sale or other disposition of property . . . ." As is common in so many divorce cases, the transfer of Petitioner's interest in the marital home is a taxable event. Since the transferor is viewed as the seller, he or she incurs a federal income tax liability for any gain while the recipient incurs no federal tax liability upon the transfer. It is thus plain that the intention underlying the state trial judge's ruling, *supra*, directly contradicts the federal tax law as enunciated by this Court in *Davis*.

The position herein asserted by the Petitioner has been consistently advanced by the Internal Revenue Service, in *Davis* itself, and in every subsequently published tax decision.

The scope of the *Davis* tax is also well established throughout the federal judiciary. See, for example, *Stephens* v *Commissioner*, 38 T.C. 345 (1962); *Hornback* v *United States*, 298 F. Supp. 977 (W.D. Mo. 1969); *Deyoe* v *Commissioner*, 66 T.C. 904 (1976); *Gammill* v *Commissioner*, 73 T.C. No. 75 (1980); *Matthews* v *United*

States, 425 F2d 738 (Ct. Cl. 1970); *Pulliam* v *Commissioner*, 329 F2d 97 (10th Cir 1964); *Estate of Bird* v *Commissioner*, 534 F2d 1214 (6th Cir 1976), and *Wallace* v *United States*, 439 F2d 757 (8th Cir 1971). No federal opinion subsequent to *Davis* has interpreted the divorce property division tax, pursuant to § 1001(a), as being one properly imposed upon the *transferee* of property.

It is therefore obvious here, as it was in the first issue of this Petition for Certiorari, that, irrespective of the federal precedent to the contrary, many States still disregard or misconstrue the rulings of the lower federal courts on matters involving the *Davis* Tax.

State rulings such as this one place the party to a divorce in a "Catch 22" situation. For state divorce court purposes, the income tax liability is considered the responsibility of the recipient of the transferred property. But how does the transferor report it to the Internal Revenue Service? If the transferor willfully ignores the teachings of *Davis* and progeny, then he or she risks exposure to tax evasion (26 U.S.C. § 7201), or at the very least, has contravened the "false statement" section of the Internal Revenue Code (26 U.S.C. § 7206(1)). The unfortunate taxpayer could also be liable for the fifty percent (50%) civil fraud penalty (26 U.S.C. § 6653(b)). See, also the five percent (5%) negligence penalty (26 U.S.C. § 6653(a)).[6]

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[6] See n. 4, *supra*.

III

The state trual judge eschewed the validity of the tax consequences in this case because he believed they were "speculative" and "imaginary," (44a). In evaluating the worth of each asset, the trial judge refused to deduct any tax from the gross value of the asset; he declined to recognize these taxes as valid liabilities. As with the other tax issues presented in this Petition, the trial judge simply ignored the ramifications and supremacy of the Internal Revenue Code.

On March 7, 1979, the Michigan Court of Appeals affirmed the trial judge's refusal to consider "speculative, imaginary tax consequences" (52a). Neither the trial court nor the appellate tribunal applied the facts of this case to their terse legal conclusions that these tax incidences were "speculative" and "imaginary."

The Michigan Supreme Court denied leave to appeal on this issue on April 4, 1980.

Throughout the Michigan judicial system, Respondent has successfully asserted the fiction that the various tax liabilities already incurred by the Stricof estate were illusory and should be discarded. Such a position is erroneous in the extreme.

In approaching the proper manner by which to evaluate the Stricof marital estate, the state trial judge was presented with two alternatives in which to treat the attendant tax liabilities. Initially, he had the option of ignoring tax ramifications in their entirety because, as here in part, he believed them to be "speculative" and "imaginary." Or, the trial judge could have

attempted, consistent with the evidence, to determine that dollar value which fairly reflects the tax incidences brought about by the division of the marital estate. Since, "disregarding the effect of taxes may (as here) result in an unrealistic and unjust result," *Wetzel* v *Wetzel*, 35 Wis 2d 103, 150 NW2d 482 (1967), it is extermely difficult to comprehend any rule of law which encourages state trial judges to ignore so critical an element. See, generally, Anno — *Consideration of Tax Impact*, 51 ALR 3d 461 (1973), and cases cited therein.

At trial, expert testimony illustrated that Petitioner possessed assets which had substantial tax incidences. For example, Mr. Stricof possessed a 15% interest in Shelco Investment Company, an installment sale basis land contract receivable. (106a-109a) The record undisputably shows that as principal payments are collected on the contract, Petitioner incurs $7,603.00 in income taxes. See, 26 USC § 453(a)(1) and (b)(1)(A). In addition, a $3,392.00 tax liability would be incurred by Petitioner on the collection of the proceeds of Greenfield North, another installment basis land contract. (125a).

The *existence* of these taxes is not speculative. There can be no doubt that either Mr. Stricof, or his estate in the event of his death, will have to discharge these encumbrances. That much is unarguable. What is not pristine is *when* these taxes must be paid and, therefore, precisely how much they will be. But, as was done in this case[7], a careful lawyer can lay the

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[7] Petitioner recognizes that the trial judge discarded this testimony on the grounds that the witness who offered it — Orville Lefko — was lacking in credibility. (43a-44a) However, implicit in the Michigan Supreme Court's April 4, 1980 order of remand "in light

(cont'd on following page)

necessary evidentiary foundation upon which to have expert witnesses determine the dollar amount of income tax as of the approximate date of the entry of the divorce decree. Since tax liabilities can be determined to a reasonable degree of certainty, their inclusion in a state trial judge's calculations is vastly superior to disregarding them in their entirety.

Only last term in a state court personal injury action brought under the Federal Employer's Liability Act, this Court was confronted with a similar argument. There it was urged that a lay jury was incapable of ascribing an appropriate dollar amount to a decedent's future estimated after tax earnings. Forcefully rejecting that contention in clear language that could have been written with Respondent's "too speculative" objection to determining these tax consequences in mind, the Court, in *Norfolk & Western R. Co.* v *Liepelt*, — US —, 62 LEd 2d 689, 694; 100 S Ct — (1980), said:

> "Admittedly there are many variables that may affect the amount of wage earner's futute income tax liability. The law may change, his family may increase or decrease in size, his spouse's earnings may affect his tax bracket, and extra income or unforeseen deductions may become available. But future employment itself, future health, future personal expenditures, future interest rates, and future inflation are also

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(cont'd from preceding page)

of the plaintiff's *clear* tax liability that arises out of the *undisputed* fact that the nursing home properties had negative bases of $70,000 and $127,000 at the time of trial" (Emphasis Supplied) (58a) is the resurrection of Mr. Lefko as a witness by Michigan's highest court. This is so because *only* Mr. Lefko offered evidence of the nursing home properties negative bases — evidence which the Michigan Supreme Court had no trouble determining to be "clear" and "undisputed."

> matters of estimate and prediction. Any one of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life. We therefore reject the notion that the introduction of evidence describing a decedent's estimated after-tax earnings is too speculative or complex for a jury."

If the tax consequences are not too speculative for a jury, the circuit judges of Michigan should not be held to a lesser standard.

It is respectfully submitted that this Petition for Certiorari should be granted in its entirety.

Respectfully submitted,

BRUCE T. LEITMAN (P16541)
1263 West Square Lake Road
Bloomfield Hills, Michigan 48013
(313) 338-4501

GARY M. GOODFRIEND (P22867)
17117 W. Nine Mile Road
Suite 536
Southfield, Michigan 48075
(313) 559-9797

Attorneys for Petitioner

DATED: August 28, 1980.

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DOCKET ENTRIES

(Oakland County Circuit Court)

1973

Jul. 30. Complaint for divorce filed.
Jul. 30. Summons issued.
Aug. 16. Proof of service on summons filed 8-3-73.
Aug. 16. Answer to complaint for divorce filed.
Aug. 21. Reply to answer to complaint for divorce filed
Sep. 19. Notice of Issue No. — NJ.
Nov. 14. Injunctive order filed.
Nov. 14. Consent injunction re: alienation.

1974

Jan. 30. Stip. and order for first adjournment filed.
Feb. 25. Interrogatories Series I filed.
Mar. 13. Answers to interrogatories filed.
Mar. 19. Answers to interrogatories filed.
Mar. 26. Order of adjournment filed. & stip.
Apr. 2. Supplemental interrogatories to Pltf. filed.
Apr. 10. Motion for hearing on objections to supplemental interrogatories filed.
Apr. 15. Notice of Hearing file.
Apr. 15. Answer to pltf's. motion in the nature of motion to compel answers to interrogatories and adjournment of trial date filed.
Apr. 17. Reply to answer to pltf's. motion for hearing on objections to supplemental interrogatories filed.
Apr. 24. Stip./order for second adjournment filed.
Aug. 15. Adjourned over term subpoena continued.
Sep. 11. Motion to withdraw as atty. for pltf. filed.
Sep. 26. Stip./order for third adjournment filed.
Oct. 2. Order withdrawing as counsel for Pltf. filed.
Oct. 4. Affid of mailing filed.

Oct. 10. Appearance filed.
Oct. 2. Withdrawal of Pltf's atty allowed.
Oct. 23. Stip./order for fourth adjournment filed.
Oct. 29. Notice of taking deposition filed (Lorraine C. Stricof).
Oct. 29. Proof of service of notice of taking deposition filed.
Nov. 27. Deposition of Lorraine C. Stricof filed. Letters Sent.
Nov. 27. Interrogatories to Def filed.
Nov. 27. Proof of service filed.
Dec. 9. Interrogatory to pltf filed.

1975

Jan. 24. Def's. answer to interrogatory filed.
Jan. 29. Notice of taking deposition filed. Abraham Burnstein.
Jan. 29. Affidavit filed.
Jan. 29. Proof of service on notice of taking deposition filed. Jeptha W. Schureman.
Feb. 5. Pltf. answer to interrogatory filed.
Feb. 5. Proof of service filed 2-3-75.
Mar. 10. Stip. & Order for fifth adj. filed.
Mar. 24. Non jury trial begins ½ day trial time.
Mar. 25. Non jury trial continues — ½ day trial time.
Mar. 27. Non jury trial contines — one day.
Mar. 28. Non jury trial continues — ½ day trial time. adj. to 6-9-75.
Jun. 12. Non jury trial continues — 1 day trial time.
Jun. 13. Non jury trial continues — one day trial time.
Jun. 19. Non jury trial continues — ½ day trial time. Proposed findings of fact and conclusions of law due 5 pm Jul 11 replies Jul 25.
Jun. 16. Non jury trial continues — one day trial time.
Jun. 17. Non jury trial continues — one day trial time.
Oct. 10. Pet for order for D to execute 1974 tax returns filed.
Oct. 10. Proof of service filed. 10-8-75.

1976

Mar. 5. Motion for more specific findings of fact filed.
Mar. 12. Judgment of divorce filed. (10).
Mar. 12. Statement on specific findings of fact — ½ day trial time.
Mar. 30. Notice of filing of claim of appeal filed.
Mar. 30. Motion for fixing of bond and for stay of proceedings filed.
Mar. 30. Claim of appeal filed. Letters sent. CS.
Apr. 9. Substitution of attorneys filed. Notice filed. Bruce T. Leitman.
Apr. 13. Motion for the setting of an appeal bond and stay of proceedings-filed.
Apr. 13. Proof of Service-filed.
Apr. 13. Notice of Hearing-filed.
Apr. 14. Order for temporary alimony and interim counsel fees-filed.
Apr. 29. Stip for restraining order. Order filed.
May 14. Order fixing bond and staying proceedings filed.
May 18. Bond on appeal filed.
Jul. 21. Order from the Court of Appeals filed.
Aug. 31. Transcript of trial vol. 1 filed.
Aug. 31. Transcript of trial vol. 2 filed.
Sep. 2 Notice to counsel & Affidavit of mailing.
Oct. 1. Stenographer's certificate & Notice of Filing filed.
Oct. 14. Transcript of March 27, 1976.

1977

Feb. 15. Letter from Court of Appeals filed, granted.
Feb. 18. Appearance filed, Zemke.
Apr. 19. Letter of transmittal from Court of Appeals filed.
Apr. 19. File sent to Court of Appeals, Lansing run CH.

1978

Feb. 8. Appearance-filed.
Mar. 22. AOS 032278 AIO Hampton, hearing 4-25-78.
Mar. 22. Apr. date assigned for appearance for 780425 H.
Apr. 11. Pltf's post remand Request for Finds of Fact filed.
Apr. 27. Notice of Hearing filed.
Jun. 1. Proof of Service filed 6-1-78.
Jun. 1. PS consolidated post remand Request for Finding Facts filed.
Jun. 14. Proof of Service filed.
Jun. 28. Proof of Service & Affdvt of mailing filed.
Jun. 28. Appearance filed.
Jun. 29. Plf's Reply to dfdt's post remand Reqt for Findings filed.
Jun. 29. Proof of Service filed.
Aug. 11. Post-remand Findings and Conclusions filed.
Sep. 7. Motion to Compel Signature filed.
Sep. 7. Notice of Hearing filed.
Sep. 7. Proof of Service filed.
Sep. 14. Transcript of proceedings had on 8-1-78.
Sep. 25. Steno notice of filing of transcript filed.
Oct. 4 Motion heard under advisement.
Oct. 6. Letter of transmittal from Ct of Appeals filed.
Oct. 6. File sent to Court of Appeals filed, Lansing run CO.

1979

Apr. 4. Order from Court of Appeals filed.
Apr. 4. File returned from Court of Appeals, letters sent mem.
Jul. 31. Letter of transmittal from Supreme Court filed.
Jul. 31. File sent to Supreme Court Lansing, run KSL.

1980

Apr. 8. Order from Supreme Court filed.
Apr. 8. File returned from Supreme Court, letters sent mem.
Jul. 16. Plf's Motn to Disqualify Richard D. Kuhn, etc., Affid filed.
Jul. 17. Post judgment proceeding.
July 17. Motion to Disqualify Judge denied-accting held.
Jul. 24. Order Deny pltf's Mot to Disqualify R D Kuhn filed.

DOCKET ENTRIES

(Court of Appeals of the State of Michigan)

1976

Mar. 31. CV-Claim of Appeal.
Mar. 12. Order appealed from: Oakland County Circuit, Judge: Kuhn, Richard D, LCT 73100923 DO.

1978

Jan. 25. Opinion filed; PC-RET Jur Panel: Result: Remnd. DEH,NJK, John E. McDonald; Find Fact Juris retnd.
Oct. 13. Record filed, file; 1TR; Oakland.
Oct. 13. Record filed, file; TR; Oakland.
Oct. 14. Supplemental Brief, appt, by: PTY 01 PL-AT P/S:101078, Atty: Leitman, Bruce T of: Bloomfield.
Nov. 6. Supplemental Brief, appe, by: PTY 02 DF-AE P/S:110678, Atty: Schureman, Jepth of: Detroit. both briefs sent to panel.

1979

Mar. 7. Opinion filed, PC panel: DEH NJK JC Result: PAR on remand; JC Dissent.
Mar. 30. Remmittitur & record retrn, files-2; TR-5; Depo returned to Oakland County.
Jun. 13. Appl for Leave to Sup Ct.
Jul. 09. Transferred to Sup Crt. COA file sent to Sup Crt.

1980

Apr. 4. S/CT Ord Gr & Remand to CT/AGY.

DOCKET ENTRIES

(Supreme Court of the State of Michigan)

1979

Jun. 12. Delayed application for leave filed.
Jul. 10. Court of Appeals record filed.
Aug. 1. Circuit Court record filed.
Oct. 1. Answer in opposition to application filed.
Oct. 1. Defendant's delayed application for cross-appeal filed.
Oct. 9. Answer and brief to cross-appeal filed.
Oct. 10. Appellant's response to defendant's counter-question three filed.
Oct. 15. Defendant's reply brief filed.

1980

Apr. 4. In lieu of granting leave of appeal, Remanded to trial court with instructions.
Apr. 4. Court of Appeals and Circuit Court records returned.

JUDGMENT OF DIVORCE

(State of Michigan
In the Circuit Court — County of Oakland)

(Filed Mar. 12, 1976)

(Norman J. Stricof, Plaintiff, vs Lorraine C. Stricof, Defendant. Leonard E. Bellinson (P10665) Attorney for Plaintiff, Jeptha W. Schureman (P20109) Attorney for Defendant. Judge Richard D. Kuhn (P16285). Civil Action No. 73-100923)

At a session of said court held in the Courthouse Tower in the City of Pontiac, Oakland County, and State of Michigan, on March 12, 1976.

PRESENT: HONORABLE RICHARD D. KUHN, Circuit Judge.

This cause having been brought on to be heard upon the Complaint for Divorce filed herein by plaintiff, and the answer of defendant, the court having heretofore taken plaintiff's and defendant's proofs in open court, from all of which it satisfactorily appears to this court that there has been a breakdown of the marriage relationship of the parties to the extent that the objects of matrimony have been destroyed and that there remains no reasonable likelihood that the marriage can be preserved.

On motion of Leonard E. Bellinson, attorney for plaintiff,

I

DIVORCE

IT IS HEREBY ORDERED AND ADJUDGED, that the marriage of the parties hereto be and the same is

hereby dissolved and a divorce from the bonds of matrimony is adjudged effective as of the date hereof.

II

MINOR CHILDREN

There are no minor children of the marriage of parties.

III

PROPERTY SETTLEMENT

The Court finds as a fact, from all the evidence and testimony presented herein that, notwithstanding the ostensible title or ownershhip thereof being in one or the other of the parties hereto, all of the items listed hereinbelow for division are, in fact, the property of both parties hereto, either jointly or in common, with the exception of that property held in either a custodial or trust account for the benefit of the children, and that this division thereof serves only to partition the same, and is not intended to constitute award of property of one party or any interests therein, to the other, for any consideration.

A. IT IS ORDERED AND ADJUDGED that defendant wife receive as her sole and separate property, the following items:

1. The marital home at 28435 Brooks Lane, Southfield, Michigan, (the note and mortgage on which defendant wife assumes and agrees to pay and from which defendant wife shall hold plaintiff husband harmless), together with all furniture and furnishings presently located therein (except those items specifically awardcd to plaintiff husband hereunder).

2. 1971 Ford car, or any car replacing it, and any lien on such vehicle is to be assumed and paid by wife and from which she shall hold plaintiff husband harmless.

3. U.S. Government Series "E" bonds owned by either party or jointly as of November 6, 1975.

4. Marketable securities and municipal bonds owned by either party or jointly as of November 6, 1975 including those listed on the attached Exhibit "A", and including all dividends, stock or cash, interest, rights or other benefits that may have been paid or accrued on account of such securities or bonds.

5. A right to receive the first $33,040 paid to plaintiff husband upon the 15% interest standing in the name of plaintiff husband in "Shelco Investment Co.," a Michigan co-partnership, secured by a lien thereon.

6. Reserve Fund Account (Chemical Bank) in the amount of $85,000.00, plus interest paid or accrued from November 6, 1975. In the event the present face amount is less than $85,000.00, the plaintiff husband shall pay forthwith to the defendant wife cash in the amount of that deficiency.

7. All interest standing in name of plaintiff husband in "Texas International Drilling Co.," a partnership.

8. This 1/6 interest in name of plaintiff husband in "Paint Creek Golf & Country Club," a Michigan co-partnership.

9. Life insurance policies on the life of plaintiff which are owned by defendant including the following:

(a) North American Life, Policy 649 368 S.
(b) Dominion Life, Policy 196,334.
(c) Dominion Life, Policy 196,577.

B. IT IS FURTHER ORDERED AND ADJUDGED that defendant wife shall receive as her sole and separate property 50% of the amounts paid to plaintiff husband from or on account of plaintiff husband's 27-1/2% interest in Frenchtown Convalescent Center, Inc., a Michigan corporation, and its related entity, FCC Properties, a Michigan co-partnership.

The intent of the foregoing language is to award defendant wife fifty percent (50%) of the amount received or benefited to plaintiff husband from payments of principal, capital, income or otherwise, including any amount received by plaintiff husband upon a sale or other diminution of his interest therein, with a maximum limit of $135,000.00 to be paid to defendant wife under this provision.

The interest of plaintiff husband at date of judgment in the aforesaid corporation and partnership is 27-1/2%.

The amounts so received by defendant wife shall be alimony taxable to her and deductible by plaintiff husband.

The payments to defendant wife shall be made to her by plaintiff husband within 10 days after receipt by him of the money or benefits. 50% of any such receipts by husband from November 6, 1975 to date of this judgment shall be paid to defendant wife within 30 days of this judgment.

C. IT IS FURTHER ORDERED AND ADJUDGED that defendant wife shall receive as her sole and separate property 50% of the amounts paid to plaintiff husband, from or on account of plaintiff husband's 20% interest in Van Buren Convalescent Center, Inc., and in Van Buren properties (a co-partnership).

The intent of the foregoing language is to award defendant wife 50% of the amount received or benefited to the plaintiff husband by way of principal, capital, income or otherwise, including any amounts received by plaintiff husband upon a sale or other diminution of his interest therein with a maximum of $170,000.00 to be paid to defendant wife under this provision.

The interest of plaintiff husband at date of judgment is 20%.

The amounts so received by wife shall be alimony, taxable to her and deductible by plaintiff husband and shall not terminate as a result of death or remarriage.

The payments to defendant wife shall be made to her by plaintiff husband within 10 days after receipt by him of the money or benefits. 50% of any such receipts by husband from November 6, 1975 to date of this judgment shall be paid to wife within 30 days of this judgment.

D. IT IS FURTHER ORDERED AND ADJUDGED that plaintiff husband receive as his sole and separate property, the following items:

1. Stricof and Polk partnerships and Stricof and Polk, Professional Corporation shares standing in the name of plaintiff.

2. The projector, screen, camera, photographs, slides and films, the blue couch from the office, the living room chair, the Stricof and Polk filing cabinet, including client wallets.

3. 1975 Oldsmobile or replacement car.

4. Stricof and Polk, P.C., retirement trust funds attributable to plaintiff.

5. All life insurance policies on the life of plaintiff husband excepting those owned by defendant wife which have previously been awarded to her in this judgment.

6. All interest of the parties in Greenfield North co-partnership and land contract.

7. All interest of the parties in World Computer Corp.

8. The 15% interest in Shelco Investment Co., co-partnership subject however, to the previously awarded rights of defendant therein.

9. All bank accounts of the parties not solely titled in name of defendant wife, except reserve fund account (Chemical Bank) previously awarded to wife and further excepting any accounts of a custodial or trust nature in favor of any child of the parties hereto as beneficiary.

10. All real estate held in partnership or otherwise, not otherwise disposed of herein, including interest in Big Rapids Building Co. and in Regency Park Apartments.

11. The 27-1/2% interest in Frenchtown Convalescent Center, Inc., and FCC Properties (a

co-partnership) presently titled in plaintiff, and the 25% interest in Van Buren Convalescent Center, Inc., and in Van Buren Properties (a co-partnership) presently titled in plaintiff, subject, however, to the previously described and awarded interests of defendant wife in these properties.

12. That part of the 1974 Federal income tax refund not expressly reserved in this judgment by a subsequent provision for payment of attorney and accountant fees of wife.

E. IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff husband shall pay to defendant wife's attorney, Jeptha W. Schureman, an attorney fee in the amount of Twenty Two Thousand ($22,000.00) Dollars and to defendant wife's C.P.A., David Desow, the amount of Five Thousand ($5,000.00) Dollars. These funds are to be secured by a lien on the income tax refund pursuant to a 1974 Federal income tax return which the plaintiff husband has represented to the Court that he has filed jointly with the defendant wife, and on which there is due a refund to the parties in the amount of $33,971.19.

The plaintiff husband shall notify the defendant wife and counsel of record immediately upon receipt of the refund from this return.

F. IT IS FURTHER ORDERED AND ADJUDGED that plaintiff husband shall be liable for all marital obligations up to date of judgment including but not by way of limitation, mortgage payments, taxes, insurance, maintenance and utilities on marital residence; further, defendant (sic) husband shall be responsible for all deficiencies, penalties, interest or other obligations and

amounts due from all tax returns filed by the parties jointly, and shall indemnify and hold harmless the defendant wife therefrom.

G. IT IS FURTHER ORDERED AND ADJUDGED that each party hereto shall be responsible for his and her own tax liability incurred by reason of this property settlement.

Each party shall execute all documents reasonably necessary to effectuate the property settlement provisions set forth herein, including the plaintiff husband making available to the defendant wife at reasonable time and intervals the books and records pertaining to the Frenchtown and Van Buren Nursing Home Enterprises.

IV

ALIMONY

A. Plaintiff husband shall pay to defendant wife, through the office of the Friend of the Court, Oakland County, alimony of $3,000.00 per month, commencing on the date of entry hereof, and continuing until death or remarriage of defendant wife or until further order of the Court.

B. The award of alimony is based upon the income of plaintiff husband being between Seventy-Five and One Hundred Thousand Dollars per year. Either party may, as provided by law, petition the Court for modification of the alimony, based upon a substantial change of circumstances.

C. So long as plaintiff husband has any obligation to pay alimony to defendant wife hereunder, he shall maintain in effect insurance on his life (term or permanent, at his option) as security for payment

thereof in the event of his death, in the amount of $200,000.00 with defendant wife as beneficiary thereof, and shall present to defendant wife proof of his continuing execution of this provision.

V

DOWER

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff shall pay defendant herein One Dollar in lieu of her dower in his lands and that he shall hereafter hold his remaining lands free, clear and discharged from any such dower right or claim of defendant.

VI

INSURANCE

IT IS FURTHER ORDERED AND ADJUDGED that except as otherwise specifically provided hereinabove, all rights of either party in and to the proceeds of any policy or contract of life insurance, endowment, or annuity upon the life of the other in which he or she was named or designated as beneficiary, or to which he or she became entitled by assignment or change of beneficiary during the marriage or in anticipation thereof, whether such contract or policy was heretofore or shall hereafter be written or become effective, is hereby extinguished and at an end.

VII

CHILDREN'S PROPERTY

IT IS FURTHER ORDERED AND ADJUDGED that neither of the parties shall be awarded any beneficial interest in the property, real or personal, of the children of the parties and shall hold such properties as shall

have been in the name of either of the parties as of the time of trial of this cause for the use and benefit of such children.

VIII

RETENTION OF JURISDICTION

IT IS FURTHER ORDERED AND ADJUDGED that the Court retains jurisdiction to make such other and further orders as it shall deem necessary, upon application of either party, to give effect to the provisions herein.

IX

IMPLEMENTATION OF JUDGMENT

IT IS FURTHER ORDERED AND ADJUDGED that each of the parties hereto shall, at any time, and from time to time hereafter, take any and all steps and execute, acknowledge and deliver to the other party any and all further instruments and assurances that the other party may reasonably require for the purpose of giving full force and effect to the provisions of this Judgment of Divorce, and

Further, in the event of default by either of the parties hereto in delivering to the other any documents or instruments necessary to implement the provisions of this judgment, a certified copy of this Judgment of Divorce shall stand in its place and stead.

/s/ RICHARD D. KUHN
Circuit Judge

EXHIBIT A

No. of Shares	Company
6,100	Allied Supermarkets, Inc.
3	Bio-Dynamics, Inc.
50	First S & L Shares
1,100	Johnson Controls
38	Security Pacific Corp.
1,000	N.Y. Times-Class A
12	1st Golden Bancorp
100	Travelers Corp
198	Putnam Growth Fund
178	Keystone S4 Fund
100	Sanites Service
200	Citizens Mtg. Inv. Trust
240	Source Capital Inc.
120	Source Capital Inc. Pfd.
100	Windsor Raceway — A & B
Municipal Bonds	
$10,000	Coldwater S/D 4 1/8% due 5/1/91
10,000	Birmingham G/O 4% due 10/1/97
	Total Value of Marketable Securities

MOTION

(State of Michigan
In the Sixth Judicial Circuit Court,
County of Oakland)

(NORMAN J. STRICOF, Plaintiff vs LORRAINE C. STRICOF, Defendant. File No. 73-100923

Proceedings had in the above-entitled matter before the HONORABLE RICHARD D. KUHN, Judge of the Sixth Judicial Circuit Court, County of Oakland, Michigan on March 12th, 1976.

APPEARANCES: MR. LEONARD BELLINSON, Attorney-at-Law, Appearing on behalf of the Plaintiff; MR. JEPTHA SCHUREMAN, Attorney-at-Law, Appearing on behalf of the Defendant. MR. EDWARD SIMON, Attorney-of-Counsel.

Lynn E. Erickson, Official Court Reporter

(2) 6th Judicial Circuit Court
County of Oakland, Michigan
Friday, March 12th 1976.

* * *

The Clerk: Case number 73-100923, *Norman J. Stricof vs. Lorainne C. Stricof.*

The Court: Gentlemen, there has been a motion filed for —

Mr. Bellinson: (Interposing) Additional findings of fact.

The Court: Additional findings of fact. The Court wants to make the following statement:

In this case the parties have been married nearly twenty-seven years and have had three children, all

now the age of maturity, and this Court feels this is a classic case of the young chap who starts from scratch, the wife working to assist the husband in the completion of his education and thereby after helping in his office and in his client relationship at the social level, aiding in the development of his career.

While the husband has admittedly worked hard, is an increasingly successful business and professional man. The wife has raised their children (3) to adulthood and to a measure of independence. While the husband's success is more easily noticeable, the wife can take pride in the achievements of the children, as well as the husband should take pride in the achievements of his children,

Approaching middle age the husband decides he was bored and adopted a new life-style for himself and filed for divorce. Her children gone, rejected by her husband and without any particular skills to re-establish her life, the husband having confirmed in open court that he has been unfaithful to his wife, that he has bought gifts and taken trips with another woman, clearly the wife has been totally faithful to the Plaintiff throughout the marriage and since the separation —

Mr. Bellinson: (Interposing): Your Honor —

The Court: (Continuing): Based on these findings of fact —

Excuse me, Counsel, the Court will entertain your motion when he is through.

Based on these specific findings of fact from this trial which lasted many, many days, the Court believes, in fairness to the wife of nearly twenty-seven years, that she should receive something in the percentage of sixty-five percent of their total assets to his thirty-(4) five percent of the total assets. And, if the Counsel

would like the Court to precisely come up with that figure, the Court would do so, but this is a very difficult case as to values and as to division of properties.

Several properties are in such a condition that the Court has been informed by Counsel that there is no way this Court can distribute to the wife this property, because there are restrictions that do not permit it, i.e.: VanBuren Nursing Home, Frenchtown Nursing Home, the Shelco property and partnerships.

Therefore, the Court had to do the best it could, and when recalculating the figures as of yesterday, March 11th, 1976, the Court honestly feels it is giving the husband $280,000 in assets and the wife only $275,00 in assets. The values the Court is placing on the properties are as follows:

Marital home: $50,000: Household contents, $2,500: 1971 Ford LTD, $1,000: U.S. E bonds, $600: Marketable Securities, $46,000: Shelco partnership, $33,000: Municipal bonds, $15,000: Certificate of deposit Reserve Fund Chemical Bank, $124,000.

(5) That is what the Court thought originally it was going to give the Defendant wife. The Court has been informed, subsequently, even though both counsel in their proposed judgment indicated that was the figure as indicated by Exhibit A, that the figure has now been dropped to $80,000 rather than $124,000.

Texas International Drilling, $1,100; Paint Creek Golf Club, which is a one-sixth interest is a zero value as testified to by the Plaintiff and a debt.

For trial to her Counsel (sic) a $1,000, you take these figures and add $27,000 for attorney fees and CPA's and the Court comes up with the grand total figure that the wife is receiving $257,000.

Now, as to the husband's assets, the Court has used the figures as follows:

$2,500 for the apartment: $6,000 for the automobile: — or I should say probably if they are plural, also the Oldsmobile, '75: a retirement fund, $14,600: Cash value on life insurance, $5,000: $44,000 for Greenfield Northland accounts receivable, which was less the mortgage payable: World Computer unsecured, $15,000: The accounting practice, the figure of $173,000, although the Court is of the opinion it is worth more than that, (6) this Court would say it was probably worth $200,000, and the Plaintiff husband for payment to his Counsel $13,896.

Now, using these figures comes to $274,166, but the Court is cognizant that there was a refund in the amount of $33,000, and the Court gave all the balance of that money after the $27,000 which the Court directed that the defendant's attorney and CPA be paid, that goes to the husband, and therefore, that would be assuming the figure is $33,000, there would be an additional $6,000 which would be $280,000.

The Court is cognizant that the nursing homes which are both worth in this Court's opinion in excess of — I am speaking of total value — in excess of $2,000,000. Frenchtown being worth approximately $2,300,000 and VanBuren being worth approximately $2,250,000. The Court understands that the interest of the Plaintiff in this matter is twenty-seven and a half percent in Frenchtown and twenty percent in VanBuren. —

Mr. Bellinson: (Interposing): It's approximately twenty-five percent.

Mr. Schureman: More?

The Court: I believe it is twenty percent.

Mr. Bellinson: He just acquired an (7) addition to twenty-five.

Mr. Schureman: More?

The Court: The Court understands from the testimony that these cannot be given to the wife. The Court being very concerned about the two assets which are not included in the figure that I gave earlier in the amount of $280,000 for the husband and $257,000 for the wife, feels that she should get something from them since the husband's own testimony was that he put between 150, $200,00 cash into these investments.

The Court has indicated that she should get certain dollar figures of $170,000. She should get $170,000 from VanBuren and $135,000 from Frenchtown; but the Court made it very clear that she should only receive one half of any amount paid to the husband from either of the partnerships by return of principal of capital or income or otherwise, such amount be contributal (sic) to the wife and deductible by the husband.

And, in addition, that the husband pay to the wife one half of any amounts to be received by him upon a sale or alleviation (sic) of his interest therein. Obviously, it is conceivable that the husband may not receive any moneys from these two investments, which in (8) turn quite clearly would mean the wife would receive nothing either.

It is the intention of the Court that both parties who receive any of the property the Court has indicated shall be responsible for any taxes due and owing as the result of their ownership. Anything further?

Mr. Bellinson: Yes, I have some questions, Your Honor. You have suggested there was unfaithfulness, that the husband was unfaithful before he left home or after he left home?

The Court: The Court found there was unfaithfulness during the marriage and the Court is not making a determination when this unfaithfulness

started, but there was an unfaithfulness during the marriage and while they were lawfully and legally married, which caused the destruction of this marriage and family.

Mr. Bellinson: Is — if I understand you right, you said that the parties shall pay the taxes due on the property they receive?

The Court: Right.

Mr. Bellinson: You didn't delineate in my request for specific findings what you thought these taxes (9) would be; could you do that?

The Court: No, I could not. I am not a tax man, this man has never done that and doesn't feel it can.

Mr. Bellinson: Would you indicate whether it took into consideration the taxes in this matter in determining the values of the property?

The Court: The answer is no, I took into consideration what this Court found to be the values of each piece of property at the time of the judgment.

Mr. Bellinson: Without —

The Court: (Interposing): Any tax consequences, right.

Mr. Bellinson: All right. Am I correct, you said that you felt the split should be based on the test of sixty-five/thirty-five; is that correct?

The Court: That is correct, but yet, my figure indicates that the husband received some 23,000 more than the wife. My hands are tied because of the nature of the assets and the way they are limited.

Mr. Bellinson: Could you possibly, Your Honor, give us your formulas? A great deal of testimony has been presented for our purposes in future motions (10) and so forth in this matter; can Your Honor give us the values that you felt this test was as to the nursing homes; can you tell us?

The Court: Yes, I thought I gave values of the nursing homes.

I did put a value on the record.

Mr. Bellinson: I think I missed it.

The Court: You missed it. I put a value on the record. I put a value of two million, approximately two million three hundred on Frenchtown and a total value of two million two-hundred fifty, I believe on Van Buren.

Mr. Bellinson: Did you factor in the mortgage?

The Court: No, these are gross values, I understand there are mortgages and it was my understanding there was a mortgage on VanBuren of one million three-hundred two dollars and a mortgage on Frenchtown of one million six thousand one hundred seventy-eight.

Mr. Bellinson: You determined this from the expert testimony?

The Court: No one discussed the mortgages except Mr. Bellinson, who brought these figures in and handed me the mortgage. I don't believe there is any testimony as to the mortgage.

(11) Mr. Bellinson: You are vague —

The Court: (Interposing): Based on the expert textimony this Court relied strongly on Mr. Bernstein's testimony.

Mr. Bellinson: Even though he said he was not an expert?

The Court: That's correct, he indicated he was a CPA, attended many closings of nursing homes and attended one within the last ten days prior to the time of his testimony, and I really took his low value rather than high — high value. The Court thought from this Court's experience in real estate and matters of this

kind, which is extensive, that this Court feels these values were justified.

Mr. Bellinson: One other point, lastly here, you awarded him his insurance and Counsel raised the point that though she was the beneficiary of these insurances, the fact is these insurances were purchased by my client for his father and his children, even though she is the beneficiary. We didn't initiate that at the hearing because she was the beneficiary; you switched at the time of your discussion.

The Court: I didn't switch anything because (12) of the beneficiary, if there is ownership in a policy I would not switch because of beneficiaries. If someone would like to address themselves to whether we are speaking of ownership of policies.

Mr. Schureman: Your Honor, our intention was to ask that Mrs. Stricof have the protection of life insurance during the life of the husband without regard to ownership that he maintains and is in force and effect.

The Court: Excuse me, Counsel, we have agreed to that, and I agreed $200,000.

Mr. Bellinson: That's in addition?

The Court: That isn't what we wanted to talk about, we wanted to talk about these policies. Now, we have agreed to that whether it be term or regular life insurance and Mr. Bellinson asked could it be term. The Court indicated yes, it had no interest as long as they had $200,000 until his payments and alimony is not any longer required to be paid to his former wife.

Mr. Schureman: The fact is that Mrs. Stricof is the owner of the policy, the ownership was transferred to her and she has, herself, paid the premiums.

The Court: Based on ownership this Court ruled that the ownership, whoever owned them would get

(13) these policies. The Court did not change it because of beneficiaries, that would not be a reason for changing them; but, if in fact she is the owner as was indicated to this Court, the Court made that determination.

Mr. Bellinson: Is the Court — in my request for specific findings, did the Court find that supplying the wife with the liquid assets, of course, leaving the defendant with the taxes to pay that from alimony and from returns on the capital that the wife will be receiving from $50,552 and the husband $35,000 from the — the way these assets are and the alimony distribution is set right now?

The Court: The Court didn't make that determination, no, it did not make a determination as to value. The Court indicated the way it may be valued.

Mr. Bellinson: In talking about income from his practice and from the assets divided —

The Court: (Interposing): The Court found obviously, that he made approximately $100,000 for five years prior to the time of this divorce and the Court granted alimony in the amount of $3,000 a month based on an income of 75 to $100,000.

Mr. Bellinson: Did the Court disregard (14) the testimony of his last year's return of fifty odd thousand dollars?

The Court: The Court was not aware of the last year's testimony, the Court realized that he indicated that the income was going to be reduced greatly and I believe he was on a draw, $3,000 a month, but the Court also took note with regard to the testimony that when things were tight for him that he took a draw in the amount of $30,000.

Mr. Bellinson: My brother counsel —

Mr. Stricof: My —

The Court: (Interposing): I think he had better speak through you.

Mr. Bellinson: To keep the Court straight, it's inconsistent with some of the items awarded today.

How about taxes not paid on these items and the values will be reduced by the fact that he has to pay these taxes?

The Court: No, that was not brought to the Court's attention at any time, and therefore, the Court obviously could not take that into consideration because it is not on the record, and no one brought it out. It is a fact the —

(15) Mr. Bellinson: (Interposing): Does the Court feel that if this was disclosed that these facts were brought to the attention of the Court, then the Court feels it would change it's opinion?

The Court: No, for the reason as I stated, we have two major assets here which this Court feels at this time, that the Plaintiff has a net value in excess of 5 to 600,000 in Frenchtown and VanBuren at this very moment, and there is no way this Court can touch it. The Court would not be in any way inclined to change its judgment. The Court feels this is an extremely fair settlement based on the facts and as the Court indicated if it could be precise in dollar amount give sixty-five to the wife and thirty-five percent to the husband. The Court has failed to do that only because its hands are tied.

Mr. Bellinson: Your Honor, since the Court has stated on the record the taxes should be paid by these — either of the party who received the assets, I am suggesting to the Court that it does not enter the property judgment because I don't believe the property judgment presented by the defendant is consistent with

our statements and I ask at least a few days to review it again and show you (16) how it does not.

The Court: Mr. Schureman.

Mr. Schureman: I am extremely opposed, I think as a matter of law whatever taxes befall the parties is the consequence of the division of property of this marital estate. The Court has made the ruling that they will bear these taxes, the Court has spoken in a paragraph any benefit the Plaintiff might receive from either the nursing home in the future clearly set forth they are to be considered as taxable income and deductible by the husband. Otherwise, your Honor it's getting into a great degree of difficulty. Whatever taxes there may be each of the parties, by operation of law, is going to be responsible for his or her own taxes on the basis of the award of the property, Court awarded; that's the way I feel about it.

The Court: The Court feels this judgment basically inadequately covers what the Court's pronouncement is and the Court wants to sign it this morning. The Court feels there is no need to carry this on any further, but the Court would hand this judgment back to Counsel and that one statment that I have indicated that each party would be responsible for their taxes may be written in here so it is clear-cut, and the Court is not going any further (17) than that.

The Court does feel it is bound.

Mr. Bellinson: Can we ask that he write that in before judgment?

The Court: Yes, definitely. The Court is going to be in recess.

Mr. Bellinson: One other question. Did the Court take into consideration the testimony that stated there would be a tax of $48,000 on the valueless — two valueless apartment buildings?

The Court: Well, the Court took into consideration all the testimony, and the Court realizes that some taxes are due and owing and the Court also realizes there has been excessive write-offs but the Court can't guess, surmise, and the Court also understands some foreclosures are pending, whether or not they will become actual or real, this Court cannot guess. The Court has seen many things in foreclosures and people come back payoffs and save them. They do different things for different reasons.

Mr. Bellinson: We are talking about Big Rapids and Regency Park, $48,000 and the testimony was that there would be a $48,000 loss. I am wondering in (18) the evaluations whether the Court accepts that loss or not?

The Court: The Court did not in the evaluations placed on the record, but if the Court were to do that it still comes nowhere near, nowhere near the value where it should be.

Going through, the Court would also indicate as an alternative, Mr. Bellinson's figure, and using Mr. Bellinson's figures exactly as a value for every asset except the CPA practice, the figures would be as follows:

Wife; $243,000. Husband; $215,876. That is using Mr. Bellinson's and Mr. Lefko's evaluation of each and every piece of property and assets except — except the CPA, which the Court increased it by 75,000, but if I used what Mr. Lefko and Mr. Bellinson came in with it would be 121,000 for the husband, but you must add the $75,000 which this Court has added to the value of the practice,

196,000. You must add that to the added fee paid and charge the Defendant with it, which would come to 199,876, and you must add the tax return in the amount of 6,000 which would come to 205,876 for the husband, and the wife would receive 243,000 after you put the 28,000 on for her — for her attorney and CPA that I (19) have indicated that the husband should pay.

Mr. Bellinson: Your Honor, could we have a request that the wife sign the 1975 tax that she has been supported during that period, we have another —

Mr. Schureman: (Interposing): I don't know what it says, as a matter of fact, I will wait until you are through, I think we ought to see it, if it makes sense I will recommend he (sic) sign it.

Mr. Bellinson: Can we keep that open?

The Court: You may keep that open.

Mr. Bellinson: One other question, I guess. Did the Court take into consideration in the evaluation of the accounting practice that all the appraisers indicated that purchase of it was based on the receivables, on the realization of these Mr. Stricof will have to pay taxes?

The Court: No, the Court did not consider receivables as a practice, that is not true. The Court does know that as to the accounting practices, I believe I went from a low of 60 to 90 to a high of 278,000 by the so-called witnesses.

Mr. Bellinson: The Court did not include receivables in the evaluation?

The Court: It did not, because the Court (20) would not know the receivables as a value.

Mr. Bellinson: Your Honor, its the Court ruling that if there is this $48,000 tax liability on Big Rapids and other tax liabilities that the wife share in half of these — these taxes that sheltered the assets?

The Court: No, the Court does not indicate the wife should share in any of the taxes due and owing on any property that she did not receive. Mr. Shureman.

Mr. Schureman: I have one inquiry, Your Honor. I extended some concern about the treatment of the 1974 Federal Income Tax Return, and I would like confirmation from Mr. Stricof he has received the check from the Internal Revenue for $33,971 and 19 cents; have you received that?

Mr. Stricof: Yes, I have.

The Court: Was that not payable to both of you?

Mr. Stricof: The check was deposited to the account of Norman and Lorraine Stricof.

Mr. Schureman: And, that is —

Mr. Stricof: (Interposing): And the money is held undisturbed in the amount of $27,000 income plus (21) with the lien that had been stated by the Court.

Mr. Schureman: Did you endorse her name on that check?

Mr. Stricof: Deposited to the payor/payee bank account.

The Court: She did not endorse it?

Mr. Stricof: No, she did not have to.

The Court: You have, however, taken some of that money already, the $33,971 and 19 cents; you withdrew some of that?

Mr. Stricof: The excess over 27,000 has been withdrawn.

Mr. Schureman: But, you have taken for yourself the amount that you anticipate the Court would award when it signed this judgment, but you haven't distributed that amount that was supposed to be distributed for the payment of Mrs. Stricof's legal expenses?

Mr. Stricof: That is not true, the money was for her maintenance and support co-mingled with the other.

Mr. Schureman: You are entitled to it? Would you please identify the bank that this is deposited in?

(22) Mr. Stricof: The money was deposited to the account that was put into the record during the trial, named as Norman and Lorraine Stricof, joint account, I believe it would be identified to that Michigan National Bank account, I believe.

The Court: Is that checking or savings?

Mr. Sricof: Checking account.

The Court: Gentleman, the Court is going to be in recess.

Mr. Bellinson: Your Honor, one other point, I don't think that Mr. Schureman's professional services distribution, he is an accountant and that is not in there.

The Court: Excuse me, what is the last statement.

Mr. Bellinson: In your judgment you indicated that the division of property from the nursing home that in his professional services supplied are excluded, that is part of his professional fees, coming as the accountant and so forth?

Mr. Schureman: That's unnecessary. We specified what he is to participate in.

The Court: Obviously, the Court did not (23) entertain the question of legitimate fees, but I think if there is going to be a problem maybe the Court should review it whether it is a legitimate fee or someone trying to get around the Court. The Court did not have any intention of going into the question of legitimate fee, that should not — anything that should go to the defendant wife, no question about it.

The Court will be in recess.

Mr. Bellinson: One other question, this is a very difficult matter, and we would ask Your Honor from time to time to preserve their interests in the nursing home monies would have to be advanced, any money advanced from this date would the Plaintiff get credit for against the distribution?

The Court: That's exactly why the Court made the rule that it has, any money advanced by the Plaintiff or any further cash appropriations of these assets the Defendant does not share in it, it is strictly the Plaintiff.

Mr. Schureman: That's why you put the ceiling on it?

The Court: The Court will be in recess.

(Whereupon the matter was concluded.)

* * *

OPINION

(State of Michigan Court of Appeals)
(Filed January 25, 1978)

Norman J. Stricof, Plaintiff-Appellant, v Lorraine C. Stricof, Defendant-Appellee.

BEFORE: D. E. Holbrook, P.J. and N. J. Kaufman and J. E. McDonald, JJ.

PER CURIAM

Plaintiff and defendant were married in December, 1948. The three children born of the marriage are now all adults. The couple separated in August, 1973, after the plaintiff filed his complaint on July 30, 1973. A judgment of absolute divorce was entered on March 12, 1976. Plaintiff appeals as of right.

This appeal is fundamentally centered around the permanent alimony and property settlement provisions of the judgment and that portion of the judgment which awards defendant $22,000 in attorneys' fees, and $5,000 in accountant's fees.

It should be noted at the outset that the record does not show that plaintiff was unfaithful to defendant prior to the separation, nor is there evidence showing that plaintiff's unfaithfulness, at any time, was the cause of the divorce.[1]

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[1] The testimony concerning plaintiff's extramarital affairs after the filing of divorce was admitted on the theory of *Kretzschmar* v *Kretzschmar*, 48 Mich App 279; 210 NW2d 352 (1973), the trial court ruling the evidence admissible as to the determination of alimony and the property settlement.

This Court's powers of review in divorce cases are ably set forth in *Schilleman* v *Schilleman*, 61 Mich App 446, 449; 232 NW2d 737 (1975), *lv den* 395 Mich 769 (1975):

> "A trial court has wide discretion in dividing the property of the marital estate and awarding alimony. *Pinney* v *Pinney*, 47 Mich App 290; 209 NW2d 467 (1973). While this Court hears appeals in divorce cases *de novo*, we will not revise or modify alimony awards and property settlements in divorce cases unless convinced that we would have reached a different result had we occupied the position of the trial court." (Citations omitted.)

This Court explained:

> "We follow these rules because in a divorce action, an award of property to each party depends upon a number of equitable factors, including the source of the property, each party's contribution toward acquisition of the property, length of the marriage, needs of the parties, their earning ability and the needs of the children involved. *Irish* v *Irish*, 59 Mich App 635; 229 NW2d 874 (1975), *Hostetler, supra*. Since trial courts are in a much better position to determine the relative weight to be accorded each of these factors, we give great weight to their analysis. ***." 61 Mich App at 450.

Of necessity, that standard requires this Court to be sufficiently apprised of the underlying facts so as to be able to carry out our duties in this area. Typically, there are several questions in a divorce action on which some decision must be made. Therefore, this Court must insist that trial courts abide by GCR 1963, 517.1, which provides for specific findings of fact.

In this case, the trial was conducted over a period of nine days and consumed 900 pages of transcript. We realize that the trial court was faced with a very difficult task in order to come to a just and equitable conclusion. Nevertheless, our examination of the record leaves us with numerous unanswerable questions, without resolution of which we cannot perform our designated function.

As noted earlier, part of plaintiff's appeal is centered on the property settlement provisions of the judgment. In *Socha* v *Socha*, 5 Mich App 404, 409; 146 NW2d 839 (1966), this Court held that "[t]he [reviewing] court also reviews on the issue of whether the trial court erred in the disposition of property." However, because of the paucity of factual findings, we find ourselves unable to answer necessary questions such as:

(1) Did the trial court consider all of the tax consequences toward the parties in reaching its conclusion, particularly with regard to accounts receivable and goodwill?

(2) What portion of Stricof & Polk, C.P.A., P.C., belonged to plaintiff?

(3) What was the value of the corporation, excluding accounts receivable?

(4) Can good will of a professional corporation be considered an asset? See *Nail* v *Nail*, 486 SW2d 761 (Tex, 1972).

(5) Why did the trial court add $75,000 to the valuation of good will? Did it go by the testimony of plaintiff or did it go by its own experience and thereby take judicial notice?[2]

(6) Why is there no termination date on the interest in the two nursing homes?

Plaintiff also contends that the trial court's treatment of the alimony issue represented a serious abuse of judicial discretion. This Court has noted that:

> "The right to alimony arises out of the husband's duty to support the wife under the marriage contract. *Johnson* v. *Johnson* (1956), 346 Mich 419. Although the court's power to grant alimony is not inherent but statutory, *Ritzer* v *Ritzer* (1928), 243 Mich 406, the statute rests discretion in the court.
>
> "CL 1948, § 552.23, as amended by PA 1964, No 11 (Stat Ann 1965 Cum Supp § 25.103) provides:
>
> " 'Upon every divorce from the bond of matrimony for any cause except that of adultery

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[2] The latter alternative has been frowned upon by this Court. See *e.g.*, *Lepofsky* v *Lincoln Park*, 48 Mich App 347, 354 n. 3; 210 NW2d 517 (1973).

committed by the wife, and also upon every divorce from bed and board for any cause, if the estate and effects awarded to the wife shall be insufficient for the suitable support and maintenance of herself and such children of the marriage as shall be committed to her care and custody, the court may further decree to her such part of the personal estate of the husband and such alimony out of his estate real and personal, to be paid to her in gross or otherwise as it shall deem just and reasonable, having regard to the ability of the husband and the character and situation of the parties, and all the other circumstances of the case.'

"Thus, there does not appear to be an absolute duty to support the wife. In the most recent case, *Stathas* v. *Stathas* (1965), 1 Mich App 410, the short duration of the marriage and the youth of the parties was held sufficient to sustain a decree awarding no alimony. In *Sickrey* v. *Sickrey* (1950), 329 Mich 41, the Court sustained a decree awarding the wife only $3,000, the husband being awarded real estate valued at about $6,500, subject to a lien of $3,000 in favor of the wife to secure the judgment, and a 1939 Chevrolet." *Socha* v *Socha, supra*, at 412-413.

It is evident that a full factual explication of such a complicated area of divorce litigation is a prerequisite to proper appellate adjudication. Here again, however, there are insufficient facts to answer the following questions:

(7) Can the trial court properly term the property settlement alimony? See judgment at 4.

(8) Was the award of alimony based on MCLA 552.13[3] or also used as punishment to plaintiff (as indicated by the trial court in its March 12, 1976 statement)? See *Schaffer* v *Schaffer*, 37 Mich App 711; 195 NW2d 326 (1972) and *Gove* v *Gove*, 71 Mich App 431; 248 NW2d 573 (1976).

Plaintiff also complains of that portion of the judgment which provides defendant with attorneys' and accountant's fees. In *Socha* v *Socha, supra* at 414, Judge Holbrook succinctly pointed out:

> "Plaintiff claims she should have been awarded $300 as attorney fees. Attorney fees have also been referred to as being in the discretion of the trial court *Maynard* v. *Maynard* (1951), 329 Mich 247 (sustaining award of $175); *Wood* v. *Wood* (1939), 288 Mich 14 (counsel fees refused). Factors to be considered are needs of the wife, the ability of the husband to pay, and the difficulty of the case. 1 Michigan Practice, Moore and Moore (2d ed. 1965), § 1364."

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[3] "(1) In every action brought either for a divorce or for a separation, the court * * * may require either party to pay alimony for the suitable maintenance of the adverse party, to pay such sums as shall be deemed proper and necessary to conserve any real or personal property owned by the parties or either of them, and to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency. It may award costs against either party and award execution for the same, or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver.

"(2) An award of alimony may be terminated by the court as of the date the party receiving alimony remarries unless a contrary agreement is specifically stated in the judgment of divorce. Termination of an award under this subsection shall not affect alimony payments which have accrued prior to that termination."

See also *Gove* v *Gove*, *supra*, *Reed* v *Reed*, 53 Mich App 625; 22 NW2d 199 (1974), *Clemens* v *Clemens*, 39 Mich App 626; 197 NW2d 844 (1972).

In this case, there is not sufficient factual development of this issue to permit the answering of these pertinent inquiries:

(9) Were the attorneys' fees based on MCLA 552.13; GCR 1963, 726.1?[4]

(10) Who is paying the fees? It is the plaintiff or are both parties paying it out of the joint rebate from the Internal Revenue Service?

Thus, it is clear that, overall, further development of the factual posture of this case is necessary, and this can be done best by the trial court. We acknowledge that *Zawisa* v *Zawisa*, 61 Mich App 1, 5; 232 NW2d 275 (1975), notes that where there is a "* * * failure to

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[4] "Attorney Fees and Expenses.

"(1) In an action for divorce, separate maintenance, annulment, or affirmation of marriage, and in subsequent petitions to modify the judgment, either party may request that the court order the other spouse to pay an attorney the sum specified as necessary to enable that party to carry on or defend the suit.

"(2) The moving party shall allege facts showing that he or she is unable to bear the expense of the action without this aid. The trial judge may require the disclosure of what attorney fees have been paid.

"(3) The court may order, in the judgment or in a separate order, that whatever sum it finds necessary and reasonable be paid to the wife's attorney, either by the husband or out of the assets of the husband over which the court has jurisdiction.

"(4) The final judgment in the case shall by its entry vacate all interlocutory orders not yet complied with unless provision is otherwise made in the final judgment."

make specific findings of fact as required by GCR 1963, 517.1, [a] case must be reversed." We do not agree. We hold that a remand to the trial court to make the findings of fact enumerated above is a sufficient remedy. The trial court is also directed to reopen the case to take testimony where it deems it necessary.

We further acknowledge that the judicial circuit in which the trial court sits is very busy. Therefore, we will not set a date by which time this matter must be heard. We realize that some of the inquiries the trial court is directed to pursue will necessitate briefs from both sides. We know that the trial court is aware that a case of this type demands expeditious handling.

The trial court is directed to transmit to this Court transcripts of new testimony taken, and copies of any additional exhibits as well as its required factual findings under GCR 1963, 517.1.

We retain jurisdiction.

POST-REMAND FINDINGS AND CONCLUSIONS

(State of Michigan
In the Circuit Court — County of Oakland)
(Filed August 9, 1978)

Norman J. Stricof, Plaintiff v Lorraine C. Stricof, Defendant, Circuit Court No. 73-100923 DO, Court of Appeals No. 28132.

At a session of said Court held in the Courthouse in the City of Pontiac, County of Oakland, State of Michigan, on this 9th day of August A.D. 1978.

PRESENT: THE HONORABLE RICHARD D. KUHN, CIRCUIT JUDGE

This case is before the Court on remand from the Court of Appeals, Division One. That Court, in a *per curiam* opinion of January 25, 1978, posed ten questions for this Court to answer to facilitate appellate review of this Court's judgment. The Court has heard oral arguments, has received and considered proposed findings and responses, has reviewed its own notes, and has read the transcript of certain parts of the proceedings in this Court. No new testimony has been taken. Being fully advised in the premises, the Court makes the following determinations.

I

"Did the trial Court consider all of the tax consequences toward the parties in reaching its conclusion, particularly with regard to accounts receivable and good will?"

This Court did not consider *all* of the tax consequences to the parties in reaching its division of property. To the extent that expert testimony incorporated tax consequences, this Court did consider that factor. In the evaluation of Stricof & Polk, C.P.A, P.C., this Court did not evaluate accounts receivable. Since receivables might never be paid, they are mere expectancies that could not be known as a value. This Court said as much on March 12, 1976. (Transcript of 3-12-76, p. 19-20) Good will was considered as part of the value of the C.P.A. firm.

This Court expressly ordered in its judgment that "each party hereto shall be responsible for his and her own tax liability incurred by reason of this property settlement on the property each received." (Judgment, III.G., p. 7.) Therefore, this Court accounted for and distributed the tax liabilities that were part of the marital estate.

As to the tax liabilities about which plaintiff's expert Lefkos testified, this Court has discounted those purported tax liabilities for two reasons. First, those purported tax liabilities were calculated based on transfers of those properties in 1974, none of which were ordered and none of which have yet occurred. Further, those tax calculations were not supported by adequate foundation as to rates, deductions, or other details necessary to the calculations. (Transcript of March 27, 1975, p. 33-34, 36.)

Secondly, and more importantly, in this Court's eyes, witness Lefkos lacked credibility. His testimony that plaintiff's likely future earnings would not exceed $40,000 per year, in the face of plaintiff's own testimony that he had averaged $100,000 per year over the

previous five years, was completely incredible and patently contrived. In light of Lefkos' obvious falsehood as to plaintiff's income, this Court chose to disbelieve and ignore Mr. Lefkos' testimony on all points.

Therefore, there was no other testimony upon which this Court could have considered these speculative, imaginary tax consequences.

II

"What portion of Stricof & Polk, C.P.A., P.C., belonged to plaintiff?"

Plaintiff owned 75% of the C.P.A. firm, as this Court acknowledged on March 12, 1976. (Transcript p. 19.) In evaluating plaintiff's interest, the Court was presented with testimony evaluating plaintiff's interest in the firm in a range extending from $99,241 up to $278,000. The Court arrived at the figure of $173,000 by weighing the evidence and assessing the credibility and reliability of the witnesses and testimony this Court heard. The plaintiff himself admitted to defendant's witness Desow that the C.P.A. firm was worth $282,000. The Court did consider good will, but did not consider receivables in evaluating plaintiff's interest.

III

"What was the value of the corporation, excluding accounts receivable?"

The $173,000 value put on plaintiff's 75% interest in the firm took into consideration good will, but did not consider accounts receivable. See the transcript of March 12, 1976, p. 19 and 20.

IV

"Can good will of a professional corporation be considered as an asset? See *Nail* v *Nail*, 486 SW2d 761 (Tex. 1972)."

Nail v *Nail* notwithstanding, this Court is of the opinion that good will is an appropriate asset when evaluating professional corporations. See *In re Marriage of Lopez*, 38 Cal App 3d 93, 113 Cal Rptr 58 (1974). There, the community property law required an assumption that a spouse has contributed to and acquired an interest in the good will of a professional firm. Here, the Court has made an express finding to that effect. (Tr. 3-12-76, p.2) Therefore, as in *Lopez*, ". . . good will may thus be separate property, community property, or varying degrees of both depending upon the particular circumstances." 113 Cal Rptr 58, 67. The good will of Stricof & Polk, C.P.A., P.C. is an asset of the marriage.

See also *Moss* v *Moss*, 80 Mich App 693 (1978), in which the Court of Appeals affirmed an award of alimony which represented the wife's contribution to the acquisition of the husband's medical degree.

V

"Why did the trial Court add $75,000 to the valuation of good will? Did it go by the testimony of plaintiff or did it go by its own experience and thereby take judicial notice?"

As to how this Court derived the value of Stricof & Polk, C.P.A., P.C., see this Court's answer to question 2 (part II, *supra*). This Court did not take judicial notice of anything, but rather weighed and balanced the

testimony in light of its own knowledge and experience so far as that knowledge and experience reflected on the credibility and reliability of the evidence.

The Court did not add $75,000 to the valuation of good will of Stricof & Polk, P.C. Nor did the Court arrive at its valuation of $173,000 by virtue of its own experience and thereby take judicial notice. What the Court did was attempt to strike a balance between the plaintiff's appraisal of $99,241, and the defendant's appraisal of $282,000. In doing so, the Court added approximately $75,000 to the plaintiff's evaluation, in an attempt to be fair to both sides.

The question could as easily be asked, "Why did the Court subtract $109,000 from the defendant's evaluation?" This rather less argumentative form of the question would result in the same answer, i.e., to achieve fairness to both sides. As noted above from the record of hearing on March 12, 1976, the Court concluded, and still holds, that the accounting practice is worth more than $173,000, probably $200,000. (3/12/76 5-6)

VI

"Why is there no termination date on the interest in the two nursing homes?"

There is no termination date on the nursing home interest because none was intended. What was intended was a maximum dollar termination point, and the division of the nursing home interest is such that if the nursing home yield no profits or other form of return, neither party benefits from those interests.

Although not asked for by the Court of Appeals, this Court will address its evaluation of the nursing home

interests. As shown by the transcript of March 12, 1976 proceedings, this Court did fix a value to the nursing home interests. (March 12, 1976 TR. p. 6, p.10.) In reaching those values, this Court relied largely on the testimony of Mr. Bernstein, who actually visited the properties and had just recently participated in the closing of a nursing home transaction. This Court found Mr. Bernstein's testimony reasonable, based on recent observation, and based on his personal experience. The value placed on Mr. Stricof's interests in the nursing homes was not included in the total valuation of the property division.

VII

"Can the trial Court properly term the property settlement alimony? See judgment at 4."

In response to this question the Court points out that the term "alimony" under Judgment III.B. and III.C. was inserted not by this Court, but during a recess of court by the mutual agreement of the parties. This Court acquiesced in the use of that terminology, but did not order it and did not give its express approval of that specific language.

It is standard practice to try to frame divorce decrees and property divisions in a manner that will afford the parties some tax benefit. The Internal Revenue Code provisions regarding alimony provide that periodic payments which last over a period of ten years, or which are not installments on a fixed sum in gross, shall be treated as alimony.

These payments are not tied to any sum in gross (except that there are maximum dollar amounts specified) and the period during which the payments must be made is indefinite; it is neither more than, nor

less than, ten years. Thus, the payments fit the statutory definition and should be treated for tax purposes as alimony.

VIII

"Was the award of alimony based on MCLA 552.13 or also used as punishment to plaintiff (as indicated by the trial Court in its March 12, 1976 statement)? See *Schaffer* v *Schaffer*, 37 Mich App 711; 195 NW2d 326 (1972) and *Gove* v *Gove*, 71 Mich App 431, 248 NW2d 573 (1976)."

Initially, this Court is at a loss to find any statement in the March 12, 1976 transcript that would indicate that this Court is punishing Mr. Stricof through the award of alimony. The reference to *Gove* is equally mystifying since that case primarily deals with attorney's fees, not alimony. The statutory reference to MCLA 552.13; MSA 25.93 is also confusing since that statute deals with temporary alimony pending a final decree. The order of alimony here is part of the final decree and is properly reviewed in light of MCLA 552.23; MSA 25.103, the permanent alimony statute.

Reviewing the award of alimony in light of the statute and the circumstances of the parties reveals the following. Plaintiff had maintained his wife and household in a comfortable fashion, giving her $1800 per month during the marriage for basic household expenses and after the separation giving her over $22,000. She also expended other funds for her own maintenance. The award of $3,000 per month alimony is specifically tied to an income for plaintiff of $75,000 to $100,000 per year. The decree provides that he may petition for a modification if there is a substantial change of circumstances. The plaintiff established defendant's standard of living and maintained

it throughout the separation. The defendant must now treat the alimony as taxable income, and must meet expenses brought about by the divorce. An award of $3,000 per month is not unduly burdensome to a person earning $75,000 to $100,000 per year, and is appropriate to maintain defendant in a reasonable life style.

As to plaintiff's fault in causing the breakdown of this marriage, this Court finds in reviewing its notes taken at the time of the trial, that plaintiff admitted that the defendant had been a loyal and faithful wife. He further admitted, on June 12, 1975, that he had not been faithful to his wife. Certainly these matter can be taken into account as this Court exercises its discretion.

IX

"Were the attorneys' fees based on MCLA 552.13; GCR 1963, 726.1?"

Because of the nature of many of the assets of this marriage, defendant had restricted access to sufficient funds to pay professionals for their assistance in this matter. This was a complex and unusual nine day trial over the division of the marital estate. Plaintiff paid substantial sums to attorneys and accountants on his own behalf out of marital assets. The payment of defendant's fees was reasonably necessary, in light of the substantial amount (though not unreasonable or inflated) and defendant's limited access to liquid assets during the proceedings, and thus was within the statute.

X

Who is paying the fees? Is it the plaintiff or are both parties paying it out of the joint rebate from the Internal Revenue Service?"

The Court specifically provided that the attorney fees to defendant's counsel of $22,000 and the expert witness fee to defendant's Mr. Desow of $5,000, were to be paid from the joint Federal Income Tax refund of the parties for 1974 totaling over $33,000, with the net thereafter to be retained by plaintiff. The intent of the Court, especially in view of plaintiff's paying of costs of litigation from the joint account of the parties, was in substance to impose these awards upon the marital estate of the parties. This is clear from the transcript of hearing on March 12, 1976, wherein the Court noted that it was awarding defendant total assets of $275,000, and awarding the plaintiff total assets of $280,000. The computation of this amount to the plaintiff was arrived at by including in the total to him only the net sum of $6,000 from the income tax refund after deducting the award of attorney's fees and costs. (3/12/76 4,6)

XI

This Court feels compelled to render some additional comments on this case. As previously noted, plaintiff's chief expert witness, Mr. Lefkos, was totally lacking in credibility (part I, *supra*). This is also the case with the plaintiff's own testimony. At one point he testified that the most he could draw from his C.P.A. firm was $3,000 per month. He later testified that during one month when things were financially tight, he drew $30,000 from the firm. He also testified that, after averaging $100,000 a year over a five year period, he was sure he would never make over $45,000 in any future year. Such glaring discrepancies expose Norman Stricof, at the very least, as an unreliable witness.

This Court remains unshaken in its conviction that the property division and alimony award are extremely fair to both parties. This was a most difficult case

considering the nature and extent of the property involved, the length of the marriage, and the intricate maneuvering and manipulation by plaintiff. This Court is satisfied that it has reached the right result.

/s/ RICHARD D. KUHN
Circuit Judge

OPINION
(State of Michigan Court of Appeals)
(Filed March 7, 1979)

Norman J. Stricof, Plaintiff-Appellant, v Lorraine E. Stricof, Defendant-Appellee. Docket #28132.

Before D. E. Holbrook, P. J., N. J. Kaufman and J. E. McDonald, JJ.

PER CURIAM.

This case is before us for evaluation of the trial court's post-remand findings of fact, as ordered in *Stricof* v *Stricof* (Docket #28132, unpublished per curiam opinion, released 1/25/78). Appellant does not contest the granting of the divorce itself. His challenges are to the property settlement, alimony, and attorney fee provisions of the March 12, 1976 judgment of divorce. No further testimony has been presented, or requested, although our earlier opinion suggested that such testimony might be helpful to this court and the trial court.

The first question which we directed the trial court to answer dealt with the court's consideration of tax consequences. In its opinion on remand, the court stated that tax consequences had been considered, to the extent incorporated by the expert testimony; however, plaintiff's expert lacked credibility because he had testified untruthfully. In addition, this witness had not specified the foundational facts for his calculations, and had made his calculations based on transfers of property which had not yet occurred and had not been ordered. Finally, the court stated that the general principle which had guided the court's division was that each party should be responsible for his or her own tax liabilities on property awarded in the settlement.

We can find no fault with the above findings. The trial court has wide discretion in dividing the property of the marital estate, and in deciding which witnesses are worthy of belief. *Irish* v *Irish*, 59 Mich App 635, 636; 229 NW2d 874 (1975). The court must consider tax consequences in general, but is not required to consider speculative, imaginary tax consequences of transfers which may never occur. See *Wahl* v *Wahl*, 39 Wis 2d 510; 159 NW2d 151 (1968). The situation here is analagous to that where an employee's interest in a pension fund is a mere expectancy: such an interest is not distributable pursuant to a divorce judgment. *Miller* v *Miller*, 83 Mich App 672;__ NW2d __ (1978). *United States* v *Davis*, 370 US 65; 8 L Ed 2d 335; 82 S Ct 1190 (1962), relied on by the plaintiff, is not on point because in that case the transfers had already taken place. In the case at bar, all our opinion asked was whether the court had taken the tax consequences into consideration, and we are now satisfied that this was done.

The second through fifth questions concerned the valuation of plaintiff's accounting firm, Stricof and Polk, P.C. In its post-remand findings of fact the trial court stated that (1) plaintiff's interest in the firm was 75 percent, (2) this 75 percent interest was valued at $173,000, including goodwill but excluding accounts receivable, and (3) the $173,000 figure was arrived at by weighing the evidence and credibility of witnesses, and attempting to strike a fair and equitable balance between the valuations of $99,241 and $282,000 given by plaintiff's and defendant's witnesses respectively.

Again, we cannot find that we would have reached a different conclusion had we been in the position of the trial court. It was proper for the court to fix a value between the extreme estimates. *Greenough* v *Greenough*, 354 Mich 508, 518; 93NW2d 391 (1958), *Mitchell* v *Mitchell*, 333 Mich 441, 445; 53 NW2d 325 (1952). As to the inclusion of goodwill, we find no abuse of discretion since there was testimony from both sides that this particular firm did have valuable goodwill. See *In re Marriage of Lopez*, 38 Cal App 93; 113 Cal Rptr 58 (1974). The sixth and seventh questions dealt with two nursing homes in which plaintiff held partnership interests. The judgment of divorce had awarded defendant wife 50 percent of the benefits received by plaintiff on account of plaintiff's interests in these nursing homes "by way of principal, capital, income or otherwise." The ceiling on the amount defendant could receive was $135,000 for Frenchtown and $170,000 for Van Buren. These sums were to be "alimony," and were not to terminate "as a result of death or remarriage."

On remand, this Court asked, first, whether the trial court could term the property settlement "alimony.'

The trial court responded that the word "alimony" was added by mutual agreement of the parties. Plaintiff has not disputed this statement in his brief. The law favors compromises and settlements, and the court is ordinarily powerless to disturb the terms of a stipulation entered into by the parties as to the division of property. See *Shahan* v *Shahan*, 74 Mich App 621; 254 NW2d 596 (1977), *Dillard* v *Dillard*, 356 Mich 394; 96 NW2d 801 (1959). We find no error.

Our previous opinion also asked why there was no termination date on the nursing home interests. The trial court responded that none was intended; what was intended was a maximum dollar termination point. Plaintiff has presented no authority indicating that this was an abuse of discretion. Indeed, plaintiff's arguments are essentially directed at the court's valuation of the nursing homes.[1] We have examined the transcript and find that we would not have reached a different result. The testimony of Burnstein (defendant's expert), an accountant who had had previous experience with at least 20 nursing homes, and who had visited Frenchtown and Van Buren and found them to be beautiful, well-run facilities, was certainly no less believable than that of Lefko (plaintiff's expert). Lefko had appraised two nursing homes in his career — Frenchtown and Van Buren — and had not even visited these properties in person.

Our eighth question concerned the trial court's possible use of alimony as punishment of plaintiff for having a relationship with another woman nearly two years after his separation from defendant. We do not

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[1] We note that the trial court did not consider plaintiff's interest in these nursing homes in its total evaluation of property.

approve of the use of alimony as punishment for actions occurring so long after the separation. Nevertheless, we are convinced from our review of the trial court's statements taken in light of the testimony as a whole that the alimony award was basically intended to maintain defendant in the lifestyle to which she had contributed and become accustomed to during the marriage. We thus find no abuse of discretion. MCL 552.23; MSA 25.102; *Abadi* v *Abadi*, 78 Mich App 73; 259 NW2d 244 (1977). If there is a change in circumstances, plaintiff may of course petition the court for a reduction in alimony. *Esslinger* v *Esslinger*, 9 Mich App 11; 155 NW2d 702 (1967).

Finally, our earlier opinion requested clarification regarding attorney fees. The trial court's response indicated that defendant's attorney fee of $22,000 and expert witness fee of $5,000 were to be paid from the parties' joint 1974 federal income tax refund. The court saw these sums as "reasonably necessary, in light of the substantial amount (though not unreasonable or inflated) and defendant's limited access to liquid assets during the proceedings."

We must reverse the above award. Attorney fees in divorce actions are proper only if necessary to enable a party to carry on or defend the litigation. MCL 552.13; MSA 25.93; GCR 1963, 726.1; *Gove* v *Gove*, 71 Mich App 431; 248 NW2d 573 (1976), *Radway* v *Radway*, 81 Mich App 325; 265 NW2d 202 (1978). This was not the case here. A person awarded $275,000 in a divorce judgment does not need any help to pay an attorney and an accountant.

Plaintiff and defendant are each entitled to one-half of the joint 1974 federal income tax refund.

Affirmed in part; reversed in part. No costs.

DISSENTING OPINION

(State of Michigan Court of Appeals)

Norman J. Stricof, Plaintiff-Appellant, v Lorraine C. Stricof, Defendant, Appellee. Docket #28132.

Before D. E. Holbrook, P. J., N. J. Kaufman and J. E. McDonald.

JJ. J. E. McDonald, J. (Dissenting)

I must respectfully dissent.

We are in total agreement with the opinion written in all regards except concerning the denial of attorney fees.

The circuit judge pointed out in his response to the questions asked by this Court on remand that he believed that the attorney fees awarded for the defendant were necessary and reasonable to enable the defendant to carry on the litigation. The trial court also points out that the defendant wife's separate estate was virtually non-existent.

The trial court stated that during the pendency of this suit, the plaintiff husband paid considerable moneys for his cost of litigation from marital assets. This was done without requesting or obtaining Court approval and with no showing of necessity under MCL 552.13; MSA 25.93; GCR 726.1. The husband was awarded over $280,000.00 by the judgment. Both *Gove* and *Radway* involve situations that occurred several years after a divorce had been granted and the parties had received their separate amounts. Attorney fees were awarded on motions to modify the judgment.

We do not believe that the consideration of attorney fees on a post-judgment motion involves as many

factors as does the award of attorney fees as part of an overall settlement between the two parties at the time of the divorce when the monies under consideration are not specifically those of one party or the other as definitely as they are several years after the parties have gone their separate ways with their own funds.

We recognize that the trial court in the instant case had to deal with many aspects of a very complicated economic situation. We are unable to say that he committed error in exercising his judgment and we are unable to say that these items should be considered separately.

Part of our reluctance to interfere with the disposition of the trial court is our concern that in doing so we may create a situation where the defendant wife not only is compelled to pay her own cost of litigation but a portion of the cost of litigation of the plaintiff husband.

We would affirm the action of the circuit judge.

ORDER

(State of Michigan Supreme Court)
(Filed April 4, 1980)

Norman J. Stricof, Plaintiff-Appellant, v Lorraine C. Stricof, Defendant-Appellee.

At A Session Of The Supreme Court Of The State Of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 4th day of April in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable Mary S. Coleman, Chief Justice, Thomas Giles Kavanagh, G. Mennen Williams, Charles L. Levin, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, the delayed application for leave to appeal by plaintiff-appellant and the delayed application for leave to appeal as cross-appellant by defendant-appellee are considered. Pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we REMAND to the Oakland Circuit Court to reconsider "the matter in light of the plaintiff's clear tax liability that arises out of the undisputed fact that the nursing home properties had negative bases of $70,000 and $127,000 at the time of the trial."

In all other respects the applications are DENIED.

We do not retain jurisdiction.

Certification

State of Michigan — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 4th day of April in the year of our Lord one thousand nine hundred and eighty.

/s/ Jacqueline B. Morse
Deputy Clerk

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

(Supreme Court of the United States)

Norman J. Stricof, Petitioner, v Lorraine C. Stricof. No. A-1141.

Upon Consideration of the application of counsel for petitioner, It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 1, 1980.

/s/ Potter Stewart
Associate Justice of the Supreme
Court of the United States

Dated this 25th day of June, 1980.

EXCERPTS OF PROCEEDINGS
MARCH 24, 1975

* * *

(10) I would like to call my first witness.

ORVILLE B. LEFKO was thereupon called as a witness herein, and after having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

By Mr. Bellinson:

Q. What is your full name, sir?
A. Orville Bradford Lefko.
Q. What is your occupation?
A. I am a CPA, but my occupation is doing appraisals of closely held businesses.
Q. And, you have appeared in Court on occasion?
A. Yes, I have, frequently.
Q. And, I have asked you to appear on one other occasion; is that correct?
A. That's correct.
Q. Okay. Would you please give the Court your educational background.
A. In economics.
Q. In economics?
A. I graduated with a bachelor's degree in economics from (11) the University of Michigan, and received my master's degree in marketing from the grad school of business there.

During that time I was fortunate enough to be elected Phi Beta Kappa and Beta Gamma Sigma, the honorary business administration fraternity.

Q. Have you received any honors in the area of economics?

A. Yes, when I took the CPA exam I won the Seidman Economic Award given to people in economics and public finance, written in connection with the exam that year.

Q. And, have you had experience in the community — in the business community?

A. Yes, I have, I — during 1953 and 4 I became a manager of marketing and sales forecasting with respect to my economic background in corporate law department of General Electric Company.

I also helped organize the first University of Michigan economic conference in 1954, and I have maintained an active interest in economic matters ever since.

Q. Have you done any teaching in your field?

A. Yes, I am — I am very proud of the fact that I am a member of the faculty of the American Institute of Banking in the field of economics and I taught managerial (12) economics at the Detroit Institute of Technology.

Q. Can you give us your accounting background?

A. In accounting I received the bulk of my experience with Rilley (sic) and Ross Brothers and Metro (sic), now known as Cooper and Lybrand. I was practicing as a CPA from 1968, either as an independent practitioner or as senior partner of my own firm, and I also taught accounting.

Q. Where would that be?

A. That was at the Applied Manufacturing and Technology Center at Wayne State University.

Q. And, would you give the Court your background in financial analysis, before you continue, and that is as you did evaluations and appraisals for Mr. Stricof, are you

prepared to say this background information was necessary for this type of appraisal?

A. Yes, having knowledge in three fields is necessary in order to do a professional appraisal of a closely held business, and the third field would be financial analysis.

Q. Give me your background in that?

A. Financial analysis of the City of Detroit since 1954, and I have been — I am a past director of that Society for the '71, '72 and '73 years. I was a featured speaker at one of the conventions of the National Association of Investments in 1966 on the subject of "The Economics of (13) Being a Better Investor," and in this last fall I was chairman of the financial committee of the Financial Analysis Conference, which was held in Detroit.

Q. And, give us your background in appraisals.

A. Before I do that, referring back to financial analysis, I also have served as trustee on various personal and business individual administrators.

At the moment I have resigned from all of these financial functions and appraisals, I have done — I have the State of Michigan real estate broker's license and done real estate appraisals, also prepared appraisals of closely held businesses throughout my career, rarely, but beginning in 1971 I have devoted almost full-time to nothing but appraisals of closely held businesses.

Q. And, do you feel that it is a particular specific area with a certain type of perhaps expertise needed to evaluate closely held businesses?

A. I do. I think if you have expertise in only one of the fields you are certainly lacking to do a complete appraisal.

Q. And there are other areas in the appraisal specialty that you would like to tell the Court about?

A. No, I could only say that I have appraised a large number (14) of different kinds of businesses and — and for various persons; certainly for estate taxes, gift taxes, sales and buy and sell agreements, all these purposes are involved.

Q. Okay. You were instructed by Mr. Stricof to prepare certain financial reports; is that correct?

A. That's correct.

Q. And, would you tell the Court what these financial reports are?

A. Well, the principal purpose of my engagement was to appraise these assets of Mr. Stricof that represented investments in closely held businesses, but having done that I prepared a statement of net worth of Norman and Lorraine Stricof as of December 31st, 1974.

Having completed that I then prepared a statement of Mr. Stricof's cash flow for the year 1975 through 1976 and the year 1984.

Q. And, in preparing this material, did you communicate with Mr. Stricof's former accountant, Mr. Fullmore?

A. Yes, I did.

Q. And, to check your evaluations based on the report made by him?

A. I used — his report was one of the basic facts that I used in preparing my own report.

(15) Q. And, you also used the material presented to you by Mr. Stricof?

A. Yes, that's true. And, I also went out and obtained independent material that had a bearing on the appraisal that I did. I didn't — by the way, I must say I didn't communicate with Mr. Fullmore personally, but I did use the material that he had prepared.

Mr. Bellinson: Your Honor, at this time I have prepared a memorandum and material based on Mr.

Lefko's back-up, and I am prepared to offer to the Court, to have that presented at this time.

Mr. Schureman: May I, at this time, your Honor, I assume that we are going from — now, the area of qualifications of the expert to these opinions, and I would like under the law of *Perry v. Tassie* to examine the witness at this time.

The Court: Certainly you may voir dire him at this time.

* * *

Direct Examination

(31) By Mr. Bellinson:

Q. At the request of Mr. Stricof, you did prepare a net worth (32) statement as of December 31st, 1974 of Norman and Lorraine Stricof; is that correct?

A. That's correct.

Q. And, would you please detail that statement to the Court.

A. By detailed statement, would you like me to read the material?

Q. I would like you to recite the assets to the Court.

Mr. Schureman: This is where I am going to object, based on the fact a sufficient foundation has not been laid.

The Court: The objection is overruled, you may continue.

The Witness: The first assets that I list cash in bank or — would you like the dollar value?

Q. (By Mr. Bellinson, continue) Yes, I would.

A. One hundred thirty-three thousand five hundred thirty-one dollars. The next is marketable securities, a value of fifty-two thousand two hundred ninety-two dollars.

Q. And, Mr. Stricof has an accounting partnership, P.C.?

A. Yes, Professional Corporation, and I value that at ninety-nine thousand two hundred and forty-one dollars.

Q. All right. There is other investments, would you tell the Court the name of the investment and your evaluation?

(33) A. VanBuren Nursing Home, I should make it clear that these values represent Mr. Stricof's interests in the various business entities that they are not the total value of the entity.

Q. All right. Van Buren, how much?

A. Thirteen thousand six hundred twenty-seven dollars. Frenchtown Nursing Home nineteen thousand two twenty-three. I should stop at this point, also, and mention that there are two business entities involved with each of these nursing homes. I am lumping them for this purpose, for the purpose of just listing them on the statement of net worth.

Q. Would you tell the Court what they are.

A. There is an operating company and a real estate company which holds the real estate.

Q. Shelco?

A. Twenty-three thousand and forty dollars. Greenfield Equity, sixteen thousand nine hundred twenty-six dollars. Paint Creek Golf and Country Club, no value. Regency Park Apartments, no value. Big Rapids Building Company no value. I might add that in some of these cases of possible tax (34) consequences, in case of foreclosures they may be negative value, it is not indicated in the statement of net worth.

Texas International gdrilling Company, eleven hundred dollars.

Q. How do you pick up a negative value in a net worth statement?

A. I didn't do it, as I say, in this case; but in the case, let us say of Regency Park Apartments, in the body, in some other detail that I have I could explain that. Mr. Stricof's basis (sic) — tax base is a negative one and this company is subject to bankruptcy and foreclosure on some assets. If they foreclose he may have to pay a tax on being relieved of the liability.

Q. Is this what is called a recapture tax, the family has a sheltered deduction and has recaptured.

A. It's true, and it may be forced upon him.

Mr. Schureman: Excuse me, I have not objected on the basis of leading questions sort of prior to this, I think we are at the point now where I will object to two things, not responsive to a question and, secondly, leading questions by counsel.

Mr. Bellinson: In response, I don't think the questions are leading, and I think I am asking him questions to recite about as he sees fit, and I think (35) the answers are responsive.

The Court: Try not to lead him though, and witness try to respond to the questions as asked by counsel.

The Witness: Yes, your Honor, I am — I think I was.

Q. (By Mr. Bellinson, continuing) I will ask you the questions.

The Witness: I'm sorry.

The Court: Mr. Bellinson.

Q. (By Mr. Bellinson, continuing) Did you give us your evaluation of Big Rapids Building Company?

A. That was zero evaluation.

Q. Negative?

A. Eleven hundred dollars.

Q. Okay. And, World Computer Corporation?

A. Zero.

Mr. Bellinson: Your Honor, at this time counsel and I have a stipulation to put on the record as to value of the home.

Mr. Schureman: Yes, we have agreed, both parties have had independent appraisals of the marital home, we stipulate with counsel to a figure of sixty-nine thousand dollars and it is subject to an (36) encumbrance.

Mr. Bellinson: An encumbrance of approximately twenty-eight — there is a forty-one thousand equity.

The Court: Equity?

Mr. Schureman: I haven't seen the mortgage statement, but assume that is the case, that is about right.

The Court: Thank you.

Q. (By Mr. Bellinson, continuing) You listed in the statement of net worth the home with the residence and furnishings; is that correct?

A. Yes, that's correct, Mr. Bellinson, at fifty thousand dollars. An automobile was listed at eighteen hundred dollars.

Q. And, what about their interest in the retirement trust?

A. Three thousand five hundred sixty-two dollars.

Q. You have a total assets before liability figures?

A. Yes, that figure is four hundred twenty-two thousand eight hundred thirty-seven dollars.

Q. And, did you make an examination of Mr. Stricof's accounts payable?

A. Yes, I did, and they are listed at eighty thousand dollars.

(37) Q. And deferred income taxes?

A. Deferred income taxes are listed at one hundred eighty-four thousand ninety-eight.

Q. Total liability of what?

A. Two hundred and sixty-four thousand nine hundred and sixty-eight.

Q. And, you come up with a net worth of what?

A. Leaving a net worth of one hundred fifty-seven thousand eight hundred sixty-nine.

Q. Okay. For my own information, his tax holdings will be —

The Court: I Think we're going to quit at four thirty and you will be on at nine fifteen in the morning, and for your clarification and so you can plan, we'll go until noon tomorrow at the regular usual morning recess. We'll go to noon tomorrow, generally we pick it up at 1:30, but tomorrow is my sentencing and arraignment day and they are extremely long. Monday there is a Judges' meeting. I suggest, in fairness to you, we will only have a half day of trial tomorrow and pick it up again on Thursday at 9:15, you might check with me, I understand Judge Arthur Moore has got some arraignments he wants me to handle which shouldn't take over a half hour, so you can return at 9:30 Thursday and (38) go the full day and the next day, if necessary, and all day Friday, if necessary. Don't count on going past 4:30 and going past noon tomorrow.

Mr. Bellinson: Your Honor, I am going to ask some questions at the present time concerning the valuations of the company partnership and I think it would be a good time to break, if it is, I have another matter I could put on the record.

The Court: We'll pick up again at 9:15 in the morning.

(Whereupon the matter was adjourned to another date.)

* * *

EXCERPTS OF PROCEEDINGS

MARCH 25, 1975

(39) 6th Judicial Circuit Court
County of Oakland, Michigan
Tuesday, March 25, 1975
(Second day)

(Whereupon in the matter entitled *Norman J. Stricof versus Lorraine C. Stricof*, this trial being continued all parties present same as before.)

The Clerk: Case number 73-100923, *Norman J. Stricof versus Lorraine C. Stricof.*

Mr. Bellinson: Your Honor, a brief stipulation to a piece of evidence which is the mortgage balance on the marital home as of December 31st, should we mark it?

Mr. Schureman: I think we can just stipulate to it.

The Court: If you stipulate you don't have to mark it.

Mr. Bellinson: This is the paid up balance of twenty-seven thousand six hundred nineteen (40) dollars to December 31st, I assume there has been three or four principal payments of about eighty-eight or eighty-nine dollars for three or four months, which would reduce the principal.

The Court: All right.

Mr. Schureman, do you stipulate that this is a reflection of what the mortgage balance is due and owing at the end of January?

Mr. Schureman: I haven't seen it until this morning, your Honor but I think that I will agree that this does fairly represent the balance owing on the marital home.

The Court: All right.

Mr. Schureman: I don't know what the escrow balance is at this time; presumably it is slightly larger.

Mr. Bellinson: So stipulated.

The Court: All right, it has been stipulated.

ORVILLE B. LEFKO Having been previously sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified further as follows:

Direct Examination
(Continuing)

(41) By Mr. Bellinson:

Q. Mr. Lefko, as an expert in closely held corporations, would you please tell us your techniques in determining values of closely held corporations?

A. Yes, my approach to any evaluation problem connected with a closely held corporation business revenue ruling 59-60, which I consider to be the prime — oh, the prime source, let us say, of a procedure to be used in evaluating a corporation — closely held corporation.

Q. Please outline for the Court what your understanding of that regulation is?

A. Yes, the regulation, the revenue rule 59-60 states that a sound evaluation will be based upon all the relevant facts, about the elements of common sense and form judgment and reasonableness must enter into the process of weighing these facts and determining their aggregate significance. The factor that the revenue ruling and some regulations that pertain also to this problem and estate and gift tax regulation, the factors that are listed and are generally considered to be important are the company's net worth, its general financial condition, its perspective (sic) earning power and

demonstrated earning (42) capacity, its dividend paying capacity, the good-will of the business, and the personal economic outlook which is very important and the economic outlook in the particular interest of the operation of that company that is being valued, and one other thing; if you can find comparable securities to be liquidated, these are also a factor to be considered.

Q. Would these elements be essential questions to our partnership?

A. Oh, yes, they certainly would.

Q. If some of the assets are joint ventures, would it be the same?

A. Same sort of factors would be important. Now, most of these — all of these factors, in fact, taken together, properly used will allow an appraiser to determine a normal net income or earning capacity of a business, and to that normal net income or capacity must be applied a capitalization rate.

Q. You feel — you feel that in your opinion the interest seeking of all of these elements you mentioned are important in arriving at a cogent evaluation?

A. Yes, indeed. (43) And, in further determining the capitalization rate, there are several factors that must be considered such as the risk involved, the liquidated equity of the investment. You see, you get into the aspect of what is a comparable, not a comparable, and alternative vested opportunity of value to a prudent investor.

That prudent investor would be looking at whether there was a certain return, whether it is a regular, in the case of closely held businesses where you have a majority interest, particularly ownership, private rights a right to have a company car, the right to belong to a golf club, all enter into the proper appraisal of a closely held business.

Q. Mr. Lefko, there will be some closely held businesses here that their real estate would be a factor; do you have an opinion how significant a real estate factor is, say the marital home interest or business interest?

A. Yes, I do. I feel that the real estate owned by the nursing home, in which Mr. Stricof has an interest, is a little significant in value, his interest is in the nursing home.

Q. Why is that?

A. I say that because to begin with, the evaluation of the real estate in these homes would lead to, let us say, an (44) adjusted book value determination being with the value represented by the balance sheet of these enterprises and appraisers would want to adjust that value to represent so that the underlying value of any assets whose value may have changed since they have been entered on the balance sheet may be properly depicted.

Having done that and having arrived at an adjusted book value it will be our question to ask does this have any significance in this case. I have numerous quotations that perhaps I would like to read.

Q. You want to recite these to make up your opinion?

A. With regard to value and significant —

Mr. Schureman: Your Honor, I will at this time, object to any sort of narrative responses. I think this ought to be done question and answer.

Mr. Bellinson: He's an expert and he is responding.

Mr. Schureman: Expert he may be, but this is direct.

Mr. Bellinson: He's my witness, he's responding to my questions.

The Court: You may continue.

Q. (By Mr. Bellinson, continuing) Could you quote without (45) reading your citation that you are relying on them for the opinion?

A. Yes, I would like to open my case and just get the books themselves, a book called "Valuing a Company," by McCarthy and Healing (sic), who is active with Price-Waterhouse. The other, "A Retired Gentleman" who has a significant — several significant quotations with regard to what book value means in appraisals — you don't want me to read them?

Q. You have these citations and relied on these?

A. I have a book which is, you might say, the bible of securities and lists all "Security Analysis" by G. M. Dodd and Kottol (sic).

Q. And, you rely upon that as an authority for your position?

A. Yes, and I have several court opinions which have been involved in the estate tax cases, primarily which are contained in a book called "Corporate Security Value as Determined by the Tax Court." These are assembled by standard and closed corporations.

The Court: What is that citation?

The Witness: The various court citations?

The Court: Yes.

The Witness: The Estate of Sidney J. Katz, (46) the Judge was Judge Petersen (sic). I have a Prentice Hall reference, Prentice Hall 681-71. "The Taxpayer," was Solomon. I and Beatrice Kaplan, Judge Simpson, Prentice Hall 740-29.

Q. I think that's adequate.

A. There are several more.

Q. All right. Have you made an evaluation of the Stricof Polk P.C.?

A. Yes, I did.

Q. Please tell the Court what you evaluate that business at and how you arrived at that evaluation.

A. I evaluate the Stricof and Polk P.C. at ninety-nine thousand two hundred forty-one dollars.

Q. How did you arrive at that figure?

A. It is a professional corporation in which there are ten thousand shares of capital stock, which Mr. Stricof owns seventy-five hundred shares.

However, Mr. Stricof has the right at any time to buy the other twenty-five hundred shares for twenty-five percent of the equity indicated on the corporation balance sheet, which is prepared on a cash basis. Thus, I would say that logically before (47) he would sell his practice he would purchas the twenty-five hundred shares at — according to the agreement of twenty-five percent of the equity represented by the balance sheet. So, that in considering a sale of the practice, I said that Mr. Stricof would purchase these twenty-five shares, he would then own the entire practice. The amount that he would have had, he would have had to pay based on the May 31st '74 balance sheet which was the last that I had available to me at the time, would have been three thousand six hundred and fifty-six, and, therefore, I deducted that from the appraised value of the practice, arriived at as described, starting with the balance sheet, stockholders' equity as shown thereon.

I am referring always to the May 31st statement of six thousand twenty-four dollars of which ten thousand nine hundred sixty-eight would be Mr. Stricof's share if book value could be realized; but, furniture and equipment which cost twenty-four thousand seven hundred forty-five is on this statement at a net value of twenty thousand, that's after depreciation and it is generally known, even regardless of the condition of office furniture and equipment, you can't realize

perhaps much more than a quarter of its costs on a sale of such equipment on the market.

(48) Carpeting, of course, it would have no value unless you picked it up, rolled it up. I re-evaluated the furnishings and equipment at six thousand and that left no equity at all in the balance sheet.

Now, as of December 31st of '74, which again, were the latest figures then available to me, there were important assets of the company that were not contained on the balance sheet. Since it is prepared on a cash basis, and these included unbilled work of eighteen thousand eight hundred sixty-three dollars, that is work that has been done, but not billed.

Q. Not picked up in the billings?

A. Right.

Q. You did include that?

A. I certainly did, and also accounts receivable of ninety-two thousand one hundred five dollars. Now, that is a total of a hundred ten thousand nine hundred and sixty-eight dollars, a discount of fifteen percent for uncollectables and adjustments of bills is justified on such receivables and particularly in the case of Mr. — practices like Mr. Stricof, where billings are prepared automatically by multiplying staff member's hours by their given rates and then very often these bills have to be renegotiated with clients after (49) they are rendered. I was familiar with that practice when I worked with Labler-Montgomery, we went through the same thing. A bill that specified rates of the senior, junior was submitted by the senior and then sitting down with the client and renegotiating the whole thing. This is common and is done by merely applying the fifteen percent dicount for these adjustments and collectables.

This figure was then reduced to ninety-four thousand three hundred twenty-three dollars but this is still not

cash in hand, so if the pahment for the receivables would be forthcoming as the receivables would be closed and it is reasonable to assume that complete liquidation would consume eighteen months. Without judging whether the eighteen month figure is correct, a hundred ten thousand dollar figure represents over five months billing at current rates of billing.

Q. At his current billing rate?

A. At his current billing rate.

Q. What is his gross billing rate now per year?

A. It seems I am using a figure of two hundred sixty thousand dollars.

Q. Gross bills?

A. Annual gross bills, that is normal, regular gross bills (50) returned to the receivables. I — I calculated the present value of these receivables nine months hence, which I though that was fair, since I felt it would take eighteen months to fully collect the entire amount. I used nine months in the future, and using regular financial tables they would be worth ninety-three and a half cents per dollar and, therefore, the ninety-four thousand three hundred twenty-three would be worth only eighty-eight thousand one hundred ninety-two right now, as of December 31st, '74.

Furthermore, these are subject to income taxes — I'm sorry, do you want me to go into that?

Q. This is how you are arriving at your evaluation?

A. All right, even if the ninety-four thousand that I calculated could be realized, it would be subject to corporation income taxes because it is a professional corporation, and I used the effective rate of the state income tax at 7.8 percent, plus federal tax at forty-eight percent, which recognizes a state tax as a deduction.

By the way — well, that total on these two rates adjusted 52.05 percent, that is forty-nine thousand ninety-five dollars in taxes would be paid and deducting this from the eighty-one ninety-two leaves thirty-nine thousand (51) eight hundred ninety-seven of net value to the professional corporation.

I then proceeded to deduct two thousand dollars as a fair statement of trade accounts payable that would be present in any going operation at the end of any given month, actually I was probably quite conservative in that statement because the expenses represented by Mr. Stricof's payables are running at least four thousand per month.

Q. Why did you only select two thousand?

A. I understood from him that it was his practice, as in so far as possible, to pay bills as they came in instead of waiting.

Q. So, you picked out —

A. (Interposing) So, I arbitrarily took out half of his normal operation expenses, they would be unpaid at the end of any given month, two thousand dollars, I did not obtain a detailed list of, you know, representing two thousand dollars thus the value of the assets, net liabilities to the corporation — of the corporation that year end of '74 would be thirty-seven thousand eight hundred ninety-seven dollars, but to this figure should be added an appraised figure of what is the worth of the accounting practice per se..

(52) Q. Are you telling us that the accounting practice, without any assets or any standing by itself has an actual value?

A. Yes, that's true.

Q. Okay.

A. Practices — professional practices are bought and sold.

Q. Accounting practices?

A. Accounting practices, correct. Now, the starting point in that has to be what its actual amount of annual bills are.

Q. Are there specific accounting practices differentiated from another type of business?

A. Yes, there are, basically.

Q. Would you tell us what they are.

A. Yes, basically any professional practice not owned, any accounting practice, I am talking about accounting practices, basically, an accounting practice — practice's value largely is determined by its amount, its annual amount of regular bills. The nature of these bills, the type of work, this would be the two principles.

Q. What about the procedure of holding?

A. Oh, well, when you get into that that is a key factor in a professional practice evaluation.

Q. Whether you hold the business?

A. That's right.

(53) Q. Buy it you are going to hold it?

A. It is for that reason that if anyone were to offer to buy a practice and pay cash for it at this moment he would probably pay less than forty percent for any professional practice, cash I am talking about, based on all other ways of appraising practices. Once he arrived at his figure he would get no more than forty. There would be a transition of the client.

Q. Do you want to give us your evaluation at this time?

A. Yes, Mr. Stricof has a type of practice which is, while it renders excellent services to his client, that in itself the way that this is achieved, this good service, is a weakness in valuing the practice. The reason I say

that is all of his several men, I believe, except one, are CPAs.

Q. Before you go into that, would you give us a background of his accounts and type of accounts they are, we are talking about selling these accounts?

A. That's right, exactly.

Q. The word practice, the people, the accountants, the business, they're going to get, break it down for us, please, what they are?

A. All right. Approximately twenty-thousand dollars of the total, total two hundred and sixty.

(54) Q. Okay.

A. Of the total of two hundred and sixty approximately twenty thousand dollars is attributed to the VanBuren and Frenchtown nursing homes, and this pointed up one of Mr. Stricof's methods apparently of building a practice. He invested in his clients and in that way they do have a tie to this accounting practice, perhaps greater than some other accounting practice.

Q. His economic investment in the business ties him in both realistically and professionally to the client rather than being an impersonal, a non-owner accountant?

A. Exactly so.

Q. What happens to the saleability of that type of business when this occurs?

A. Well, in this occasion selling the business, selling that an interest — his interest in these businesses not only involves the sale of these interests but would involve the loss, probably involve the loss of accounting fees.

Q. How much of — how much of his accounting fees, percentage-wise, or dollar-wise is related to his ownership in other businesses; if you know?

A. I don't think I ever totaled that figure completely.

Q. All right.

A. But, I can continue with a breakdown of the type of client (55) Mr. Stricof has, and perhaps that would partially answer the question.

If we start with the two hundred sixty and deduct twenty thousand in fees for the two nursing homes, roughly, we would have two hundred forty thousand, — of the two hundred forty thousand dollars remaining.

Twelve clients, accounting for about a hundred twenty-four thousand of these fees, and of these seven clients whose fees total about seventy-four thousand are the type and size of clients that would probably engage a larger firm, even a big eight accounting firm for their work if Mr. Stricof were out of the picture, and this was an important consideration for anyone buying a practice.

Q. What is your evaluation as to why they would switch to a big eight firm now?

A. Why wouldn't they? Right now Mr. Stricof provides excellent service, fine representation.

Q. Why wouldn't someone buy with a similar representation and not be able to keep these clients?

A. It's been my experience in looking at accounting practices that there is a very personal relationship between a client and the owner or the manager of the firm.

Q. Is there also a change in the accounting industry going on now that would occasion this?

(56) A. Yes, indeed.

Q. With the — the new government regulations that pertain to such fields as pensions, the new Pension Reform Act of '74 for the individual accountant. Previously all kinds of regulations concerning what we

thought were tax shelters, more use of computers, sophisticated tax planning by firms that do have their own computers, like Price-Waterhouse, et cetera, their own computer to individual practices to offer anything like what might stay with Mr. Stricof, historically, but given the opportunity to leave they probably would hightail it to the first big eight firm that would take their account.

Q. In fact, Mr. Stricof —

Mr. Schureman: That's reading, your Honor, I am going to object.

Q. (By Mr. Bellinson, continuing) Did —

The Court: You may rephrase it.

Q. (By Mr. Bellinson, continuing) Did Mr. Stricof do anything to deal with this change in the industry?

A. Yes, indeed, I get into that in quite detail.

Q. Tell us generally right now.

A. Pardon?

Q. Tell us generally what he did?

A. He did sell his practice, or trying to seek the right word, (57) it was merged with J.K. Lasser Firm, by a national firm. At one time this proved, and it was for these very reasons that he could better compete with the larger firms, offer better services to his clients and to provide some security for the future, because Mr. Stricof recognized the very tendencies that I have tried to discuss in brief right now, that the individual practitioner had a very hard row to hoe for the future.

Q. All right. Now, let's get back to the situation of these accounts and how you arrived at the evaluation of the business, the practice.

A. Going further into the discussion of the practice —

Mr. Schureman: (Interposing) There is no question, you said going back to, to what?

Q. (By Mr. Bellinson, continuing) I asked him to continue how he evaluated the price of this practice?

A. Yes, I then went further into the nature of the practice, and I found it was highly management consultation oriented. By that I mean each of these highly paid staff members really served as controllers on the staff of their client, they worked right with the client.

Q. You are talking about the six CPAs?

A. Six CPAs and a seventh staff man. It's a very personal relationship, much more personal (58) between them and the client than between Mr. Stricof and the client.

Q. What would this mean in —

A. (Interposing) Many, many clients would choose to remain with their staff men. Let us say their staff men were to leave, rather than to go and remain with Mr. Stricof, and this of course weakens the sale of the practice too.

Q. I see. You have an opinion as to how much dollar value could be kept in the event of a sale?

A. Yes, I — to avoid all the details, I finally did come down to this figure that a potential purchaser would, in effect, have to base his offer on one hundred thirty-six of bills out of that two hundred sixty, which could reasonably be expected to remain with him.

Q. This is how you came up with your figure?

A. Yes, indeed.

Q. Are there any other aspects that you used in arriving at your evaluation?

A. Well, having arrived at the hundred thirty-six thousand dollar figure I said that and again, I guess I was being quite liberal. I stated that right at that — at any given moment a potential purchaser would pay thirty-five thousand dollars for these accounts, and that

is forty-eight percent of the hundred thirty-six thousand, that's why I (59) say I was probably —

Q. (Interposing) That's about eighty per cent more than the rule of thumb?

A. Of course the rule of thumb does apply to the total, I think it would be easily determined by a potential purchaser. Two hundred sixty would not remain with them.

Q. Of this two hundred sixty, this gross figure, what income after the expense of the office and sixty percent, what is Mr. Stricof netting from this?

A. Okay, that I did state. Mr. Stricof's pre-tax cash flow, and after taxes, disposable income and based on the value of two hundred sixty thousand dollars, I stated that Mr. Stricof could draw a salary of thirty-six thousand dollars a year.

Q. Now, there being some talk of large figures, hundred fifty thousand, hundred thousand, how do you account for that variation fo your appraisal; what he normally nets from his practice and the actual amount?

A. I have come to that — for that this way, Mr. Bellinson, that the practice of Stricof and Polk at the present time, that's the name of the P.C., is quite different. It is an entirely different business than it was pre-merger or sale. However, that should be properly charted with the J.K. Lasser and Company. At that time Mr. Stricof or Stricof and Polk's (60) total value was five hundred thousand dollars or more.

Q. Double what it is now?

A. Now, as I say, it is down to two hundred sixty.

Q. Double what it is down, he's operating at half the value he did in prior years?

A. Previous to that time he had had, I think, four partners. I have the details of that, and fifteen or

sixteen staff people. Now, as I say, he has seven staff, one partner, it's a different business, it isn't the same business in any way.

Q. Do you know how that came about?

A. Pardon?

Q. From your investigation how did the business change; why is the business doing less and has less value now than it did before?

A. One of the things that did happen at the time Mr. Stricof was with Mr. — the J.K. Lasser Company was that at the time of the demerger they merged.

Q. When he came out of it?

A. He came out of it, he was not happy with J. K. Lasser, they had made promises that evidently were not about to be fulfilled.

Q. All right.

(61) A. And, three of Mr. Stricof's former partners formed their own firm at the time of the demerger and took with them many of Mr. Stricof's — Mr. Stricof's former clients, and these reduced his practice from five hundred thousand to the present two hundred sixty thousand.

Q. Are there any other factors that you used in evaluating the practice as it stands now?

A. No, having valued the practice at twenty-five hundred shares of stock, which he did now own and place the sixty-five thousand dollars of calculated value for the practice, per se, I then — I arrived at my figure of ninety thousand two hundred and forty-one dollars.

Q. That includes the assets, accounts receivable, what you think the value of the business is?

A. It does, that's his practice complete in my opinion.

Q. Now, in appraising his assets, did you have occasion to appraise a corporation and partnership

known — we'll call it the VanBuren Convalescent Center Inc., and VanBuren property?

A. Yes, I did.

Q. Okay. And, would you describe your approach to the appraisal of these businesses, as I understand your previous testimony you valued his interests individually of thirteen thousand seven hundred dollars?

(62) A. What was that?

Q. Thirteen thousand six hundred twenty-seven dollars?

A. Thirteen six twenty-seven.

Q. Would you tell the Court how you arrived at that appraisal?

A. Mr. Stricof's interest is twenty percent interest in both the partnership and the corporation involved in that VanBuren. The corporation, VanBuren Convalescent Center Incorporated is the operating entity which operated the nursing home with the licensed capacity of two hundred twenty-two beds.

Q. All right. And, I — why did they separate into separate entities, why are there two entities?

A. The partnership owned the building and the corporation runs the business. Of course, I would have to input a reason, I don't know of my own knowledge why they did it at the time, but very often this is done for tax purposes.

Q. To get the depreciation on the building, to get the personal depreciation?

A. The depreciation flows through the partnership to the partners, not only in nursing homes but other business entities, restaurants —

Q. (Interposing) All right. Now, you may continue.

A. One important thing to consider with regard to value of Mr. Stricof's interest in these corporations, is that it (63) is a minority interest, twenty percent, and furthermore it is quite heavily restricted with regard to his ability to resell it.

Q. Do you want to read from the partnership agreement what the restriction is?

A. From the partnership agreement dated November of '69, paragraph eleven:

> "No party shall, except with the consent of the other parties, assign, mortgage or sell his share in the partnership or in its capital assets or property, or enter into any agreement as a result of which any person shall become interested with him in the partnership."

Paragraph sixteen describes the purchase price for a deceased partner's interest, and it says it shall be the sum of the following items:

The net capital investment of such deceased partner, even if less than zero.

And, that in an interesting provision, and then the percentage interest in the partnership held by such partner would be multiplied by what they called a base valuation, that base valuation is something that the partners determine from time to time, and in the case (64) of the VanBuren property it is three hundred thousand dollars as of December 31st, 1971 — I'm sorry, five hundred thousand, I read it wrong. Five hundred thousand dollars as of December 31st, 1974, twenty percent of which would be one hundred thousand dollars and as of December 31st, Mr. Stricof's capital account showed a negative forty-one thousand five hundred forty-one dollars, so that in the case of death he would receive slightly over fifty-eight thousand dollars.

Q. In the event of his death?

A. Event of his death.

Q. Fifty-eight thousand dollars?

A. Right, for his interest. Now then, there is a strong redemption agreement which has to do with the corporation and that says —

Q. (Interposing) Read that.

> "While this agreement is in force no stockholder shall assign, encumber, pledge, transfer or otherwise dispose of any of the shares of the corporation now or heretofore owned by him, except (65) pursuant to the terms of this agreement."

And, article five goes on to say that:

> "In the event of the stockholder wishes to dispose of his stock during his lifetime he must tender a written offer of his entire holding to this corporation, the sales price of such stock shall be the value of the disposable stockholder's interest set forth in article three thereof, except that the book value of the last day of the month preceeding the date of the offer."

In article three it refers to book value on the last day preceeding the day of death of the stockholder.

Q. How do these restrictions go to evaluation?

A. Any restrictions on the sale of individual must be taken into account by an appraiser, and would generally result in a lower evaluation being presented.

Q. The free market flow of his ability to sell?

(66) A. That's true.

Q. He is locked in by the agreement?

A. Exactly. Article three goes on to that:

> "In determining book value no specific value shall be placed on goods while or other intangible assets of the corporation."

That is very important. Getting back to the real estate in the VanBuren properties, then, that is operated by VanBuren Convalescent Center Incorporated, it is now easy to see if we were to look to the net book value and even adjust it, the fact that Mr. Stricof owned a minority interest must be taken into account.

A minority interest can't force the liquidation of the corporation.

Q. In other words, he cannot break the lock on an agreement by force and liquidation?

A. So, even if I were to look at net asset value or net book value, it would be a meaningless figure in determining what Mr. Stricof's interest is, and remember, I might emphasize in doing an appraisal it must be kept in mind that what we are talking about, and I'm going to quote now (67) from a state tax register 20.2031-3:

> "What we are talking about is a net amount which a willing purchaser with an interest or corporation would pay for the interest to a buying seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts."

And, it is further presumed from ruling 5960 that the buyer and seller are not only willing but able. This is important, because we are talking about not a hundred percent of VanBuren, but rather a twenty per cent minority interest and we are talking about some prudent investor coming to Mr. Stricof and offering him money for that highly restricted minority interest.

Q. Where they would be locked into the same situation, and that is another reason that would be after the shareholder-partners would waive their rights?

A. Only in that.

Q. Outside persons coming in would be very minimum?

A. Exactly.

(68) Now, there is another I would call it an even stronger restriction against Mr. Stricof's sale in his interest value that is his relationship to the other owners, two of whom he brought into the deal in his capacity as, let's say CPA or management consultant, and they depend on him to safeguard his interests.

Q. Did they pay for some of his ownership?

A. Yes.

Q. His being a participant?

A. Mr. Stricof is getting an equivalent interest with them invested only one dollar to every two dollars they invested.

Q. You consider the import they put on him being —

Mr. Schureman: (Interposing) That's leading, your Honor.

The Witness: That's right, the building is an ex —

Mr. Schureman: (Interposing) That's speculation on the part of this witness.

Mr. Bellinson: I will withdraw that question.

The Court: Question withdrawn and will be stricken.

Q. (By Mr. Bellinson, continuing) Would you give us some more of the factors that you based your evaluation on?

(69) A. Yes, I found that VanBuren had changed its administrators twice in its history and at the time I did this appraisal it was likely that it was going to change again, and I think they have.

Q. This is a brand new business, couple years old?

A. Yes.

Q. Okay. Go ahead.

A. Umm — they have not been able to attract enough private patients in the nursing home. Patients — private patients, these are the ones who might pay more, let's say, more than Medicaid or Medicare patients would pay. They must be attracted in order for the nursing home to make the profit that the investors hope it will make.

The problems with the State have been numerous, and in the case of VanBuren includes improper handling of infectious diseases which almost cost the home its license. That was in August of 1973. They have never been able to hire the proper number of nurses, and this is a problem which seems to be prevalent in the nursing home situation. I could even quote — I don't want to take the Court's time, but there is an article in the United — U.S. News World and World Report describing the situation which is nationwide. Too high a number have been Medicare patients and many of these who actually (69) receive treatment do not pay and the homes hope to be reimbursed by Medicare. When the government audits, which they do audit these nursing homes, the patients may refuse to actively bill back Van Buren if they have paid VanBuren, or refuse to pay at all for those services that VanBuren has already rendered to these patients.

Now, as of August 31st, 1974, at the time — at the time I did the appraisal, this was the last record that I had available to me, but there was a total deficit on the books of the VanBuren Convalescent Center of seventy-six thousand seven hundred sixty-one dollars.

Q. This is loss?

A. It's loss to date.

Q. So, it hasn't made any money?

A. No, it has not made money.

Q. Is that important in evaluating the value of the business?

A. Yes, indeed, earnings, dividend paying companies, and if not dividend paying capital certainly earning power is an essential factor of doing the evaluation of the business.

In the case of a minority business where I have already commented on the fact that a minority shareholder can't force the liquidation to get at the assets generally, I suppose there may be some highly technical (71) legal instances where a liquidation might be forced with a practical ruling, a shareholder cannot, so therefore, he must look to earnings and earnings are absent in the VanBuren property.

In fact, Mr. Stricof's tax base in the VanBuren property, and this is the real estate operating firm, was a deficient of seventy thousand dollars, seventy thousand eight at year end '74.

Q. Why is that that they received the treatment and went from the VanBuren Convalescent Center?

A. Well, in that case depreciation accounts for the large part of the deficit, and this is part of their tax planning, but the problem is that if an actual economic loss is being suffered by the combined partners, all the tax planning in the world hasn't helped. There must be an economic profit and the government in attacking tax shelters uses that very freely. If an arrangement has not been entered into for an economic profit, or profit can be realized, the government is very likely to rule it is not acceptable for internal revenuers.

Q. Do you want to continue.

A. At the moment — that is, at the time that I did this appraisal, money has had to be lent to the corporation from the partnership by way of the partners to keep it (72) operating.

Q. You mean they're giving the — returning the money they are receiving?

A. It's simple mathematics, one can't exist without the building.

Q. There is one such building?

A. Exactly, here we have a definitely — if we were going to look to the real estate which I don't do in my appraisal, didn't think it is significant, what we have is a one purpose building. If anything, there is a lower purpose to which it would be put, not higher, lower in terms of earning capacity and it could be turned into an old-age home, but — and, the situation at the time I looked at it seemed to be requiring money. The time I was there talking to Mr. Stricof he would receive troubled phone calls from Van Burn relating problems to him, telling him that additional cash would be required and so on, personal problems were —

Q. (Interposing) Has additional cash been required besides the money received by rents, beyond what it is producing — producing certain monies to pay rents, then the money is loaned back?

A. Yes, into capitaliztion.

Q. There is not enough to pay doctors back and so forth, not enough (73) money generated and new capital has to be continued, continued on?

A. Now, even if a sale could be arranged, and even if the owner could approve the sale, the tax situation presents the real problem, looking at just Mr. Stricof's situation, his tax basis is a negative seventy thousand and eight dollars.

Q. Why is that, because of the family; Mr. Stricof has had the benefit of this tax base?

A. Throughout the history of the corporation they have received tax benefits which have resulted in more,

let's say, spendable income to them, to other income sources to the tune of seventy thousand dollars.

Q. But, at some point isn't it in the alternative because there might not be floating capital to keep it going?

A. That's right.

Q. They may have to liquidate at any price?

A. That's true.

Q. Or close it up?

A. That could happen.

Q. Okay.

A. Now, this was at December 31st, '74 would be about zero as far as the corpoation's concerned, and so if he were to sell at fifty-eight thousand four hundred eighty-five, (74) which is the price he would have been paid at year end, '74 if he did, per the —

Q. (Interposing) Agreement?

A. Agreement that I read earlier, if he were to sell at that price he would have had a taxable gain of twenty-eight thousand four hundred thirty-eight dollars, all subject to ordinary income tax rates of fifty percent or more for a tax of sixty-four thousand two hundred forty-six dollars, and you can see this exceeds his selling price. It would have cost him five thousand seven hundred sixty-one dollars out of pocket to sell at that price. And, that doesn't even take into account the probable loss of accounting fees, which in the case of VanBuren is about twelve thousand dollars a year.

Q. Now, he's in a vise of continuing income against having to pay the government in the event that he sells it?

A. That's right.

Q. Is there any ultimate vise that is closing in on him in this property?

A. No, he must stay in and hope that things eventually could improve.

Q. Okay. That's a good point. From your expertise, what are the potentials for improvement?

A. Again, referring to the current U.S. News and World Report (75) article just out this week on nursing homes, the prognosis has to be bad.

Nursing homes have gotten a bad reputation throughout the country, prices that the government allows, let's say per day, for someone staying in a home and this person, mind you, is receiving housing, food, treatment and so on is in the neighborhood of twenty dollars a day. At the present time the nursing home cannot compete with hospitals. For example, all goverment, local and federal both, are becoming interested in the picture and proposing stricter and stricter regulations. It appears to me that a prudent man would not invest in a nursing home at this time.

Q. In other words, homes are changing hands and people are buying nursing homes; are they not?

A. Would you repeat that?

Q. There is — there are transactions that nursing homes are being bought and sold?

A. Of my own knowledge I don't know that is so; I would presume so.

Q. My question is, would the buying and selling of nursing homes, as a separate, have any analogous situation — would you be acquainted in this?

A. No, each one must stand on its own — on its own merits. (76) Here the nursing home that has never made any money, not produced net cash.

Q. And, all the investors are locked in?

A. Locked in, that's right, so what I did to calculate a value at this stage in my analysis and there are some other details at this stage in my analysis, that Mr.

Stricof does have a death benefit and I evaluated that death benefit like to an insurance policy.

Q. The death benefit is only good if there is money to pay?

A. Pardon?

Q. The death benefit is only good if there is money to pay?

A. That's true. That's true.

Q. In the eventuality?

A. No, I frankly didn't think of that, if anything, I evaluated it too high, but what I did was treat it as a paid up insurance policy and I used actual tables with the help, by the way, of experts in the field that I consulted with to determine that Mr. Stricof had a bit over twenty-five more years to live, as of December '74, and using a long-term prevailing interest of the fifty-eight thousand four eighty-five death benefit figure was worth .223 cents per dollar, or thirteen thousand six hundred twenty-six dollars at year end '74.

Q. There — if there is a business?

(77) A. If there is a business to pay off that benefit, so that is how I valued VanBuren.

Q. Now, Mr. Stricof has an investment in anothe convalescent home, Frenchtown Inc., an FCC venture?

A. Yes.

Q. Now, I assume you used the same measure to measure the Frenchtown as you did VanBuren?

A. Yes, I did.

Q. Your techniques were analyzed, so you don't have to go into those, but there are restrictions and so forth, so do you want to run through, for us, what did you value that Frenchtown, nineteen thousand two hundred twenty-three dollars?

A. I believe that is the figure.

Q. Okay. Can you tell us?

A. Nineteen thousand two hundred twenty-three dollars.

Q. Tell us how you arrived at that?

A. I went through the same procedure that I went through with VanBuren, their records consist of losses and —

Q. (Interposing) Excuse me, one question I didn't ask you on VanBuren, is there a benefit to Mr. Stricof to maintain VanBuren and keep it going?

A. Yeah, there is.

Q. What is that?

(78) A. It is twofold, the tax loses still do benefit him with regard to protecting other income.

Q. Yet, shelters covers for him if he can keep it going?

A. That's true, and the other benefit he kept twelve thousand dollars of accounting fees per year directly from VanBuren.

Q. Let's go back to Frenchtown.

A. Frenchtown, the FCC venture built the building, that is the partnership in this case, although it is not technially a partnership, it is called a venture and it lets —

Q. (Interposing) One other point on VanBuren, in your evaluation — in your makeup of that entry, did you know there were other investors in there that Mr. Stricof did accounting for?

A. Yes.

Q. Individually?

A. Several others.

Q. If he loses that — if he pulled out he would lose — could lose these contacts also?

A. The two that he brought into the venture, that he mentioned.

Q. That makes up this two hundred sixty thousand gross income?

A. That's true.

Q. Besides the twelve thousand dollars there is other investments that stem from these?

(79) A. That's true.

Q. I'm sorry, let's go back to Frenchtown.

A. I started to say that FCC, which is the Frenchtown real estate company lost fifty-six thousand — shall I give the exact figure, or —

Q. (Interposing) Whatever you use to come up with your opinion.

A. Fifty-six one one two was lost in '71, and in '72 ninety-three thousand nine hundred forty-seven while it was building the home. These were losses on the books.

Q. Before you do that would you recite into the record these elements of the contracts you received, particularly the sale on Frenchtown?

A. I am sorry, I thought we did.

Q. I think they are a little different.

A. Article four, paragraph 4.1 in the joint venture agreement dated March 28th, 1972, states that:

> "No party shall, except with the written consent of all parties hereto, sell, assign, lease, mortgage, pledge, encumber, transfer, partition, or otherwise alienate his interest in the property or venture or in any (80) asset of the venture, except in accordance with this agreement."

And, article four paragraph 4.3 subparagraph B details the right of first refusal, which must be afforded the other parties if one or two should desire to sell.

Article six paragraph 6.2 provides a three hundred thousand dollar evaluation for buy-out. This is an incorporate evaluation for buy-out in case of death.

Mr. Stricof's twenty-seven and a half per cent interest would be applied to the three hundred thousand dollars interest yielding an eighty-two thousand five hundred dollar death benefit modified by any required additional capital contribution of which one hundred thouand seems likely to be required in the future.

Q. From the whole group or Mr. Stricof alone?

A. (No response.)

Q. That's assuming the hundred thousand you suggested will be required to be paid into the corporation?

A. That's right, not positive —

Q. (Interposing) He owns a —

(81) A. (Interposing) He owns twenty-seven and a half percent. By the way, he shares at the moment his tax law share is thirty-three and a third percent, but his ownership is twenty-seven and a half percent, and I am not sure of this hundred thousand, I wold like to look a little further into my records.

The Court: Counsel, this may be a good time to take a fifteen minute morning recess. You may step down, Court will be in recess.

(Whereupon the morning recess was taken.)

* * *

Q. I believe where we left off, Mr. Lefko, you had just finished reading the restrictions and the incorporation?

A. I was in the middle, there is still another restriction, Mr. Bellinson. And, I had mentioned the additional capital contribution seemed likely to be required on the near future and that was for the total business of which Mr. Stricof's share would be twenty-seven and a half percent.

Q. Close to thirty thousand dollars that he would have to (82) come up with?

A. Right.

Q. How did you arrive at this?

A. I'm sorry, how did I arrive?

Q. That they would need additional capital contributions?

A. Merely looking at the records, a lot of analyzing on the other ratings.

Q. Cash flow payable and you looked —

A. (Interposing) All of the factors that would enter into a possible cash requisite need.

Q. This would be in interim cash requirements?

A. Right.

Q. Continuing investments, continuous investments of cash are going to be necessary to maintain this?

A. That is absolutely correct; money — it is additional investment required on the partners and shareholders to maintain Frenchtown in being.

Q. Now, you want to finish reading the restrictions?

A. Yes, there is one more, article eight paragraph 8.5 states that:

> "It is therefore agreed by all of the parties signatory to this agreement that in the event that any venture is a named party (83) Plaintiff or Defendant in divorce proceedings, the interest in the land of this venture, the nursing home erected thereon and the venture bank accounts shall not be transferred to the wives of any of the venturers hereunder by virtue of any property settlement or other Circuit Court relief as may be granted."

Q. And, you made a evaluation of Frenchtown as an operating business entity, both the partnership and the corporation?

A. The two together I evaluted.

Q. Okay.

A. Again, I had to go to the death benefits of eighty-two thousand five hundred dollars in the event of Mr. Stricof's death and discounting that and just for the record, this is the book allowance as I carried it, it is a heavy book Financial Compound Interest Annuity Table 50 is the value of eighty-two thousand five hundred dollars twenty-five years hence, at a prevailing long term interest rate of six percent is nineteen thousand two hundred twenty-three (84) dollars.

Q. In other words, you just evaluated the death benefit and you found that there is no sale value to the corporation or the partnership?

A. To answer that question I would have to say this, the Frenchtown has not generated anything but losses to date. The operating company loss is a hundred fifty thousand one hundred thirty-two dollars for the twelve months ended June 31st, '74, and this exceeds, by far, any cash flow from the real estate company so that as an investment designed to show a profit it certainly doesn't, wouldn't attract an investor.

Q. Now, we have talked about these entities as it is told in your experience, is there a time factor where in time with more beds being filled and so forth the circumstances will change?

A. That is true, circumstances.

Q. Did you take that into your consideration?

A. Absolutely I did and in this case.

Q. Why and how did you preclude the fact that there could be improvement?

A. Well, again, I don't think the prognosis for an investor in nursing homes is the moment and for the future. But, in doing my appraisals I also try to put myself in the shoes of a prudent investor considering ultimate possibilities for investing his money, and after all I have been in the position of advising people in that regard. The would-be investor at year end 1974 if he put his money in high grade municipal bonds would receive 6.96 percent tax free interest, a minimum the fifty percent book, it would get also fourteen percent effective returns.

Q. Let me ask you these — these are not dumb business men who are putting up the entity; is there a difference in the benefits for investors and operators to one buying it; is there a different motivation?

A. In the case of the building, a reasonable profit was made building the building. In the case of Mr. Stricof, as noted, he does get accounting fees from having put — helped either in the deal or putting the deal together or bringing investors to it, hopefully.

Q. How about the tax shelter?

A. Now, the tax shelter is the main benefit that anyone receives today.

Q. This is the part of the motivation for the venture?

A. Exactly, but just as in the case of VanBuren, the investors are locked in by their tax situation. Mr. Stricof is further locked in by his relationship to the other owners (86) and accounting fees of about eight hundred dollars that Frenchtown generates.

Q. All right. Do you want to continue your analysis, which led you to other than an insurance type benefit to evaluate the business — that shows that the business has no value?

A. Just to put certain figures on the record, the operating company lost a hundred and fifty thousand one hundred thirty-two for the twleve months ending June the 30th, 1974, and even the depreciation and amortization from the venture point of view would have sheltered a hundred twenty-seven thousand in 1974, both entities together lost two hundred forty-eight thousand two hundred forty-eight dollars.

Q. So, they couldn't shield any income?

A. No, there was an economic loss. Yes, they do get the tax benefit for any other.

Q. Not from this?

A. Not from this business.

Q. So, again, looking at it from the point of view of somebody buying Mr. Stricof's twenty-seven and a half percent is with all of its restrictions and with the characterizations of a minority interest?

(87) A. I could not, in good conscience, say that a prudent investor would pay anything for this interest.

Q. All right. And, you did some — in evaluating you did some occupancy analysis; did you not?

A. Yes, I did, there is an interesting fact with regard to occupany.

Q. This goes, I assume, it goes to the fact with inpatient occupancy the potential is limited; is that correct?

A. Yes, here there are the facts — excuse me, for the period July through October 1974, Frenchtown operated at a 62.9 percent occupancy rate and lost fifteen thousand seven hundred ninety-five dollars before any possible adjustments of revenue with regards to government audits that I have mentioned earlier.

Q. That left around forty odd percent openly for growth from that account in the institution?

A. That's true, but this should be noted, VanBuren that we had discussed earlier, operated at 92.3 percent detriment for the six months ended April 30th, 1974 and lost eighty-five thousand three hundred sixty-five dollars at that rate.

Q. You projected now recent situations they could not bring a profit for this institution?

A. That's true.

(88) Q. What's wrong if they projected that the business is sound, all these beds, and even at a total occupancy, why can't this business make money?

A. Can refer to you the New and World Report —

Q. (Interposing) Can you do it, witness, can you give us — forget the article.

A. Forget the article? They are uncompensated for — uncompensated by government sponsored patients.

Q. Is it because the wages of nurses, LPNs and doctors and other equipment have gone up?

A. That's correct.

Q. Is it because the wages for nurses, LPNs and doctors and other equipment have gone up?

A. From any government sponsored patient, that's right; at this point it is about twenty dollars a day.

Q. Most nursing homes are locked into the fees?

A. These that started much earlier than VanBuren and Frenchtown and were operated in a businesslike way and have managed to maintain a lot of, in effect, a lot of private patients have made money.

Q. Okay, but others have not? What is the difference between private patients and the government patients, so to speak?

A. For instance, a private patient, let us say someone that has (89) the benefit of a U.A.W. health plan, who had worked in the factory and this individual now came to a nursing home, they might

pay the nursing home as much as forty dollars a day for exactly the same patient comfort that Medicare would pay twenty dollars a week.

Q. What you are saying is that nursing homes are profitable if there was a different patient base?

A. That's true.

Q. Getting that high class profitable patient?

A. With regard to the VanBuren nursing home its reputation has been bad from the beginning, bad administrators and the proper administrator is possibly hard to attract. I didn't see anything in current trends that would enable me to project that VanBuren would improve its operation substantially enough to then let us say allow me to advise a potential investor; yes, this is a good investment for you, by Mr. Stricof, by Mr. Stein who has a twenty percent interest, that was the problem that was facing me.

Q. Did you do an analysis of how much cash input would be required until at some future date they could achieve a proper patient minimum?

A. No, I did not do such an analysis.

Q. But, we do agree that a period of time, inputs of capital, then it would be a rising institution?

(90) A. No question about it, based on current figures that are available on these are factors.

Q. Any other factors that we haven't discussed that went into your evaluation?

A. No, I think we have pretty well discussed both Frenchtown and VanBuren. I do believe that also maybe one other thing could be mentioned, and that is that as they were building the Frenchtown building, national building costs kept going up too, so they were burdened with a building that cost more than what they had planned on, and so that lengthens the time before their investment could possibly be recouped,

even though they had an arrangement with the builder who adding then again these rises still it did cost them some money.

Q. Maintaining this entity to Mr. Stricof would have been these investors and other accounts he had?

A. That's right.

Q. Plus the fact that if he went and left and resigned he would have to take the recap of taxes?

A. That goes without saying.

Q. How much would that be?

A. The recapture?

Q. Right, did you figure that?

A. In the case?

(91) Q. Let me ask this question, when you examined the possibility of his personal liability in the event that either one of these nursing homes failed?

A. Yes, there is personal liability on the mortgages.

Q. He is personally liable?

A. Yes, he is personally liable.

Q. These are not maintained, supervised personally liable for a suit for over a million dollars?

A. That's right.

Q. So, that is substantially over a million dollars?

A. That's one good reason why the investors must continue to pour more into these.

Q. He could be wiped out?

A. That's true, completely, many times over. To answer your question of tax bases, if Frenchtown — if Mr. Stricof's interest in Frenchtown were to be sold for nineteen thousand twenty-three dollars there would be a gain realized, taxable, some at capital gain rates and some at ordinary income rates, but the total gain realized would be a hundred forty-six thousand two hundred forty-eight dollars, becaus his tax basis is a negative 127025.

Q. You say that where ever cash accumulations — a hundred and thirty-five in cash he was able to accumulate it — (92) income against depreciation if the business failed, if it was sold or anything he would have to pick that up and that could wipe out all of that cash?

A. That's right, the benefit roughly of any tax shelter, it gives you many benefits at the moment, later the government recoups that benefit somehow.

Q. That's a debt against his assets?

A. Yes, which I have calculated.

Q. You have another, Shellco Investment?

A. Yes, this is a land contract receivable, Shellco Investment. You evaluated it at thirty-three thousand forty dollars?

A. That's right, that included one thousand one hundred five dollars accrued interest in 1974.

Q. Okay. Do you want to describe how you came to that evaluation and what that is?

A. Yes, Shellco Investment is a land contract receivable in which Mr. Stricof owns a fifteen percent share.

Q. Along with other investments?

A. Along with other investors.

Q. Do you know if these investments are accounts of his?

A. No, I don't, I have no knowledge of other investors in the Shellco deal.

Q. All right. Umm — land contracts — let's see, the sale was an installment sale. This is really actually raw (93) acreage?

A. A hundred and five acres of land located at the southwest corner of Twenty-five Mile Road and VanDyke.

Q. Do you know if these investors are accounts of his?

It was sold on an installment sale basis with a sale price of five hundred seventy-eight thousand five hundred twelve dollars. A hundred thousand was paid down and the balance is due at eighty thousand dollars per year, including seven percent interest.

Now, at December 31st, 1974, Mr. Stricof had paid fifteen percent of the balance of the contract and the interest due, his fifteen percent amounted to fifty-seven thousand three hundred fifty-seven plus the interest, that I have already alluded to of one thousand five-o-five; but, land contracts, as is generally known, are almost always discounted when sold.

Q. In appraising it you have to look at it in the market value?

A. That's correct. Again, I was trying to determine the actual value of Mr. Stricof's fifteen percent interest.

Q. Why would you have to discount it?

A. Land contract represents a claim against future cash flow, and land contracts historically have a rise in risky situations where the party does end up not having enough cash in many instances for a down payment that would qualify (94) him for a purchase.

Q. This is a seven percent contract?

A. This is a seven percent contract.

Q. And, without any tax benefits of any nature this is straight, there is no shelter in this?

A. No, this is strictly just a claim on future cash flows, you might say.

Q. You are saying the sale at the base amount, at seven percent interest, valued on today's market, are you recognizing the fact that interest rates are going down? Now, your evaluation —

A. (Interposing) This evaluation was made as of December 31st, '74, and actually I think completed at

the end of June, '75, and while interest rates are at the moment declining slightly it's my opinion that they will rise again, also.

Q. So, you took that into consideration in your evaluation?

A. I did.

Q. What kind of a return would this investment give at seven percent with a fifty percent discount?

A. You would have to discount twice, there are two discounts involved in this particular land contract, Mr. Bellinson. First of all, there is the discount which is more an arithmetical calculation because it is seven percent in and where prevailing interests are much higher for comparable risks.

Then, you have to actually apply that, a discount for the risk, which any land contract is subject to.

Q. What about a possible broker fee, did you include that in there?

A. Well, I didn't, but in this particular case, but their broker fees, any expenses of a sale should properly be considered in evaluating any assets and, frankly, I didn't try to estimate what a broker might charge to so-called peddle this kind of a contract, but having discounted it because of its yield and because of its risk, to answer your question, a possible puchaser would get a yield of under fifteen percent for the contract and money at prime rate that he could probably use to invest in this contract would have cost him ten thousand in this market at that time when I wrote this Standard Finance Company paid as much as nine percent, so you have thirty-three thousand forty dollars in that investment.

The interest in the contract was thirty-one thousand fifty-three five, and to that I added fifteen hundred five dollars of accrued interest as of the year end for a total of thirty-three thousand four dollars.

(95) Now, there is an asset known as the Greenfield Security, and you have evaluated that at sixteen thousand nine hundred twenty-six dollars?

A. Yes, the Greenfield Security is similar to the Shellco Investment besides having a land contract receivable there is a mortgage payable.

Q. What kind of property is it?

A. Twenty-four Southfield (sic), Michigan.

Q. What share does Mr. Stricof have?

A. Forty-two percent in this equity.

Q. Tell us how you came to an evalution?

A. Mr. — the balance is attributable to Mr. Stricof's share at year end 1964 (sic) were sixty-four thousand six twenty-two of the land contract receivable, twenty thousand two thirty-two of the mortgage payable for an equity of forty-four thousand three hundred ninety dollars.

Now, in today's market the reasonable being a seven and a quarter percent contract, it would have to be discounted about twenty-seven and a half percent of the basis of yield alone, another fifteen pecent for raise is in order here, particularly in view of the overbuilt situation an office building in Southfield which you can see by driving around in Southfield to see the vacancy signs that are up, plus the fact that here are many newer buildings (97) than this one involved had been built so they would get first preference from a probable renter.

In other words, the value of the underlaying property of this equity has been lengthened by the situation in Southfield.

So, taking the two discounts into account gives an adjusted value of thirty-seven thousand one hundred and fifty-six for the land contract receivable. Mr. Stricof's interest less the payable, which must be at par results in an appraised value of sixteen nine twenty-six.

Q. His share of the payable is?

A. That's right.

Q. That's the mortgage?

A. That's right.

Q. That's how you arrived at the value of sixteen thousand nine twenty-six?

A. That's correct.

Q. Mr. Stricof has Paint Creek Golf and Country Club which you evaluated at zero?

A. That's right.

Q. Is that zero or negative aspect to this, too?

A. There is a negative aspect to it as well, Mr. Bellinson.

Q. Tell us how you arrived at the value, and I would appreciate your going into the negative value of this ownership.

(98) A. Mr. Stricof is a one-sixth partner in Paint Creek Golf and Country Club, which is situated on about seventy-two acres of land in Lake Orion on Stanton Road. This partnership has lost money consistently and every year the partners have invested an additional capital so that operation could continue.

For example, in 1970 per the tax return filed by the partnership losses was twenty-five thousand seven hundred twenty dollars. Capital contributed by the owners in that year was eighty-two thousand six hundred fifty, in 1971 the loss was thirty-eight thousand five hundred eighty-two dollars, the owners had to contribute an additional forty-four thousand eight hundred to keep things operating, and in '72 there was a loss of thirty-five one thirty-four, additional capital contributed of thirty-one two fifty, and '73 the same picture, a loss of thirty-five thousand one one six, additional capital contributed of thirty-four thousand six hundred twenty-five, and in '74 I stated the loss to

be about thirty thousand dollars, and there was thirty-three thousand dollars contributed by the owners in 1974.

Q. Now, this is after depreciation in each of these — each roughly of eighteen thousand dollars, I understand these investments primarily has been an indirect (99) threat that they can maintain the operation that the land value will increase, and ultimately increase the price?

A. This can be the only thought in this particular partnership.

Q. No incentive here to run a profitable and — golf and country club.

A. They are continually loaning money over a period of four or five years.

Q. Then, their primary purpose in this vestment (sic), I assume, was the land value?

A. It would — that would be a logical assumption.

Q. Can you tell us what the prospect of this turning into anything beyond the zero amount you placed on this investment?

A. Well, if the real estate were to be sold someday at twenty-five hundred dollars an acre, which would be a price based on all the work I have done and with golf course projects in the past, and from what I know of land in the Lake Orion region, twenty-five hundred dollars an acre for virtually unimproved, we are talking about, would be an excellent price, but just taking that as a possible price without a technical real estate appraisal of that price, but as a possibility a hundred and eighty thousand dollars might be realized would be realized selling seventy-two acres of land.

(100) Q. Well, it would?

A. And —

Q. (Interposing) With these factors involved, what would be the purpose of Mr. Stricof's staying in this investment; is he personally liable on this contract?

A. There is a land contract payable with a balance of ninety-six thousand dollars at year end 1974, on which all of the parties are liable, but this hundred and eighty thousand selling price would only yield ten thousand dollars to Mr. Stricof after liability, and so forth, with pay, and furthermore he also gets accounting fees from this particular entity, just like he does in the nursing home case.

I think my opinion is that he personallly will be fortunate to break even on this, on the sale of this of his interest in Paint Creek.

This can only be avoided by reasonable sale of the land at some foreseeable time in the future, specifically when you consider that he must, they have consistently, for the history of this Country Club, have to invest substantial investments of capital every year, which you must consider as a part of his investment, and say ten years hence they would have invested another thirty thousand dollars or more, three hundred thousand dollars or more.

(101) Q. Why is the golf club losing money?

A. I have no idea, I didn't investigate the operation of the club in detail, I instead just took the partnership returns as they were filed with the government, and I could see they were losing money. I can say that again, from my own personal knowledge of golf course operations in Michigan, it is not the easiest thing in the world to make money with the operation of a club restricted by the weather plus the fact that Paint Creek, itself, has never really developed any name to attract golfers and there are numerous courses around that are better equipped to attract golfers.

Q. And, I assume the land was bought at the time that land prices were going up, this was in '69 or '70?

A. That's right, and you see, the book value at the end of '73 of the land improvement building equipment

and furniture was a hundred and eighty thousand dollars, which means that they didn't buy this cheap, and yet, if they sold it at twenty-five hundred dollars they would realize one hundred eighty thousand and the person that buys it for acreage is going to develop the land probably for residential, if he can get it zoned properly.

He doesn't want the Country Club, probably, or the equipment that goes with it. I can't picture there being a willing buyer for his one sixth interest, knowing this business, would be his only possibility for his share of the land contract payable, thus his share of the investment and what the owners have put in, it would be just better to put your money elsewhere.

Q. Why didn't they close the operation and just make the payments?

A. Why didn't they close the operation and just make the payments?

Q. Close the golf club operation and just make the payments?

A. I didn't consider it. It is a good thought, it may — I am sure it has been proposed and that they have calculated it and found that they lost less money by staying open. I don't know, as a matter of fact, I don't know the answer to that.

Q. All right. Let's go on to the Regency Park Apartments and Big Rapids Building Company. Did you make an evaluation of these entities?

A. Yes, I did.

Q. I think in your previous testimony you gave no value to Regency Park Apartments?

A. If anything, the value placed on these would be negative.

Q. In other words, you felt that the only purpose of this investment, as it appears to you, would be a tax loss?

(103) A. I would guess, I don't like to use that word but the only possible justification for either of these investments is tax shelters, and Mr. Stricof holds a very small percentage, 4.75 percent in Regency Park and if he could speak to Big Rapids, he owns 2.08 percent in that company.

Each of these companies might — could be lost to mortgage foreclosures and they can only be saved if the mortgage owners continually invest substantial funds, and that doesn't seem likely in Regency Park Apartments.

Mr. Stricof has an eighty-three thousand five hundred seventy-nine dollar negative tax base at the end of '73, which was the last factual figure that I saw but there was an estimate, which I also read from the general partnership which would indicate another fifteen thousand dollar loss in '74. His tax base at year end '74 thereby would be approximately a negative ninety-eight thousand five hundred seventy-five dollars.

Q. It is already sheltering his other income by that amount?

A. Ninety-eight thousand five seventy-nine.

Q. And, what would happen, tax-wise, in the event that these went into foreclosure?

A. Well, the foreclosure is, more or less — I don't like to speak in legal terms, I am not a lawyer, is more or less (104) indication of a sale.

Q. He would then have to — he might then be responsible for the taxes on this ninety-eight thousand five hundred seventy-nine which previously had afforded him shelter?

A. (Nodding head.)

Q. And, in your observation is that an imminent situation?

A. That's correct, not only my observation, but information that was provided to me by the general partners.

Q. Do you know why these two investments don't pan out, why they weren't successful?

A. In the one case they involved apartments at a community campus, and the college passed a ruling after or while they were — I don't know if it was after they were built or while they were in process, that the students could not live off campus, which immediately cut the tenancy prospects substantially.

Q. What about Big Rapids?

A. I don't know why Big Rapids is doing as poorly as it is. Mr. Stricof has a 2.07 interest, I didn't spend a lot of time on that investment.

Q. Okay. So, your evaluation is that both of these entities have no value and have a liability factor?

A. That's right, Big Rapids particularly is — had a foreclosure imminent, according to the material I read, and (105) supplied by the general partners.

Q. You were in touch with the general partners?

A. Pardon?

Q. You were in touch with the general partners?

A. I read his material that had been sent to Mr. Stricof.

Q. Okay. Now, what about Texas International Drilling Company?

A. There is another tax shelter.

Q. You evaluated that at eleven thousand?

A. It is of a well known type and owned currently by a corporation that hopes to do away with the depletion allowance and that aspect of an oil well company tax shelter.

Q. How much money did he invest in this?

A. Mr. Stricof originally invested ten thousand dollars in Texas International Drilling Company and eighty-nine hundred of that had been lost to date.

Q. How do you know the loss?

A. Pardon?

Q. How do you know how much it has lost?

A. It is the loss that Mr. Stricof was able to write off on his tax return.

Q. Has he received any return from his initial investment?

A. Yes, in 1974 he received one hundred twenty-one dollars, and for that reason I put — I did leave — in other (106) words, he started with ten thousand, lost eighty-nine hundred, so I put the value at the — let's say the book value of his investment eleven hundred dollars only because he had received some minor return in 1974 with no assurances of any further returns.

Q. Any other assets, like say World Computer Corporation?

A. Well, there is another investment.

Q. You valuated that at zero?

A. Right, and I can only justify that investment like many of the others, in terms of accounting fees generated thereby, which amounted to thirteen hundred dollars in 1973 and eleven hundred dollars in 1974.

Q. Now, what kind of a company is this?

A. This is a company that buys computers, it was founded in 1973, it buys these components and assembles them for particular uses and develops the software to go with them and then sells the package. It is a highly competitive field in which numerous companies have failed, I valued several of these similar companies, in one case I remember — can I digress, or should I take the Court's time?

Q. Go ahead.

Mr. Schureman: Stick to this, okay.

The Witness: Chances of a small company surviving in the highly competitive business is not very (107) good. They have loaned, since August of '73, six thousand six hundred seventy-four dollars, so that the book value — the stockholders' equity is a

significant seven thousand seven hundred fourteen. Mr. Stricof has a very small investment and no control or voting rights.

It's a minority interest as well, and not only that but he has class B stock and without going into all the details, the class A stockholder can really — is really in control of the company. He can redeem the class B stock prior to 1977 if he so wishes.

Q. Basically fifteen thousand of which six three five o is for the B stock?

A. That is correct, and the other eight thousand six fifty is a loan to the class A stockholder, and the only security for the loan is class A stock. So, the whole thing, World Computer Corporation, which has shown nothing but losses since its inception, I see nothing to attract a willing buyer for Mr. Stricof's class B stock. And, to take over the loan, again, a willing buyer would again have to be willing to take over a loan at some value with one — the security of the same company taking it. I — I can't see any value to that investment except it is justifiable from Mr. Stricof's view for the accounting fees.

Q. We have already discussed the equity in the home, automobile, (108) and how did you arrived at the retirement trust figure for five thousand three hundred sixty-two dollars?

A. The retirement trust — there was fourteen thousand four hundred dollars put into that fund on Mr. Stricof's behalf, at the time that I examined the figures about forty-eight hundred dollars of this was lost trading in the open market. After all, these retirement funds are only as good as their investments, and in this case all forty-eight hundred dollars of the equity position of the fund, as opposed to the interest position was lost. The remaining ninety-six hundred dollars cannot be taken by Mr. Stricof until he retires at age sixty-five, which is seventeen years from 1974,

and discounting the ninety-six hundred dollars for the seventeen years, we are arriving at a current value of that money. Even the interest is unavailable to Mr. Stricof currently, but if we calculate current value of it it is only worth three hundred.

Q. He can't touch it anyway?

A. Anyway unless the whole trust is dissolved, in which case he would have to pay ordinary income taxes on the money that he received from it.

Q. That is the evaluation appraised of the entire asset structure of Mr. Stricof at the present time; is that correct?

(109) A. That figure is my appraisal and listing of assets, there are liabilities.

Q. Now, giving a total for our purposes, that you then have to go into liabilities; is that correct?

A. A net worth statement must almost by definition take into account liabilities as well as assets.

Q. Did you make a review of Mr. Stricof's liabilities?

A. Yes, I did.

Q. What did you break that down into?

A. He owes Mr. Polk, his partner in the professional corporation twenty-one thousand dollars, or he did owe him at year end '74.

Q. Is that evidenced by a promissory note?

A. Right. He owes his children's trust nineteen thousand dollars.

Q. He borrowed money from the children's trust?

A. I don't know whether it is borrowed money or money that he hasn't made a payment which is due. I accepted these figures on the liabilities, by the way, without any verifications.

EXCERPTS OF PROCEEDINGS

MARCH 27, 1975

(4) Direct Examination (Continued)

By Mr. Bellinson:

Q. Do you remember you had just testified as to monies due the childrens' trust and I am going to ask you make it clear that money wasn't drawn from the children's trust and used. How did this $19,000.00 debt to the children's trust prevail?

A. As I understand it, money that was to be placed in trust for the children was mixed with other money that Mr. Stricof had in order to be able to attain or earn a higher return on the combined money because certain bonds, for example, cannot be bought at small denominations. The money is being used for this purpose but it has to be returned after that total investment when it's liquidated.

Q. Correct, and that shows up as assets, this $19,000.00?

A. It shows up, oh, yes, the $19,000.00 shows up in his assets. It's been kept under Cash On Hand, part of the cash on hand, cash and other equivalents.

Q. Okay, now you have in your statement you indicate an account for appraisal fees of $30,000.00. How did you acquire that as a debit?

A. It was strictly a estimate of possible fees of that sort based on my past experience in cases of this sort and conversations with Mr. Stricof as to what he anticipated (5) might be charged.

Q. Okay, then you indicated an item totaling $10,000.00?

A. Right.

Q. What does that make up?

A. Again, it's normal payables that Mr. Stricof might have at any given moment in time. There was no attempt to make a list of such items. I felt that at a

settlement date the items would speak for themselves whether they might total 8,000 or 11,000, I didn't know at that time.

Q. So the total accounts payable against the assets you testified to is $80,000.00?

A. Correct.

Q. Now, you have indicated in the liability section of the statement the deferred income taxes of $184,968.00?

A. Yes.

Q. Would you tell us how you arrived at that figure?

A. Well, first of all, generally accepted accounting principles require that accrual be made for deferred income taxes in preparing a statement a personal statement of net worth where the assets are shown as their appreciated values, or in some cases as their market value which may be below cost in which case there would be a negative aspect to the tax calculation. This principle is explained in a publication of the American Institute of CPAs called audit of the (6) personal financial statement, page 5, paragraph D-3. So therefore, — by the way, I have other references which I have also already put on the record such as the book by McCarthy an Neily, CPAs, valuing a company.

Mr. Schureman: Your Honor, I'm going to object to this rather rambling answer. I think the witness was asked a proper question, how did you arrive — and I don't think he can go into situations of authorities.

The Witness: I'm sorry.

Q. (By Mr. Bellinson, continuing): Tell us how you arrived at it?

A. All I did was list the item, its value, Mr. Stricof's tax basis for that item.

Q. Are these other items we have already testified to?

A. Yes, all of his assets, the nursing home, also.

Q. Again, those deferred income taxes, do they arise because he's taken a present benefit of depreciation?

A. That's right. Where the tax base is negative that indicates he's already had some tax benefit.

Q. It's then due and owing the government at a later date?

A. Yes.

Q. And must that be paid?

A. There's no question as long as his tax basis is negative at (7) the time he sells or transfers the assets, that occurrence, this indicates the payment of tax liability.

Q. I'm sorry?

A. The occurrence that indicates the payment of this tax liability. A sale or a transfer of the assets would immediately trigger this tax liability.

Q. What about bankruptcy?

A. Yes, bankruptcy I have explained that would again — anything that would qualify as a sale, exchange, transfer, in some cases an exchange would trigger the tax liability.

Q. Having listed the value and the tax bases I have calculated gain or loss by subtracting the bases from the value that was listed.

A. In some cases the gain is subject to capital gain tax and in some cases ordinary income tax. I separated those and then using the 1974 rate, calculated the potential tax liability on each asset were it to be sold or exchanged or transferred.

Q. This tax is an intricate part?

A. Yes.

Q. It does not live by itself, the assets, the tax is attached like a Siamese twin?

A. That's correct, if you list the assets you must list the liability as well.

(8) Q. And did you break down each particular asset what the tax would be on that in the event of any of these occasions?

A. Each asset in my schedule?

Q. Yes.

A. As far as the marketable securities go, the tax would be a negative, there would be a benefit to Mr. Stricof.

Mr. Schureman: Your Honor, I observe the witness is referring to a memorandum presumably to refresh his recollection. I wonder if there is a copy available so I can follow the evidence?

Mr. Bellinson: I didn't offer the Court one and I don't think Mr. Schureman should be entitled to any greater privilege than the Court. I offered it earlier and he objected and I see no reason for it at this time. He's raised the objection and he's reconsidered overnight.

Mr. Schureman: Talking about two different things, I notice the witnes is referring to a memorandum and I am entitled to see what he's reading from.

The Court: Mr. Schureman, you are entitled to look at what he's referring to.

Mr. Schureman: Thank you.

Mr. Bellinson: Do you want to show (9) him that one page you are looking at right now to refresh your memory?

Mr. Schureman: Is that the only copy available to the witness?

Mr. Bellinson: I can give you a copy of that page. Here.

Mr. Schureman: Thank you.

Q. (By Mr. Bellinson, continuing): Would you continue your testimony?

A. The first item that is marketable securities on which the tax would actually be a tax benefit of $10,250.00.

Q. Why is that?

A. Because Mr. Stricof's tax base is larger than the value the securities was as of the year end of 1974.

Q. Because of a loss?

A. In the value. The marketable securities have gone down in value.

Q. Sometimes there is a tax gain in the taxes itself through the assets and sometimes there is a loss?

A. Correct.

Q. Okay, and you have to go on both ways?

A. Identifying both ways, yes.

Q. Okay, so you show tax gain of $10,256.00?

A. A benefit to Mr. Stricof. Okay.

(10) Q. Okay, all right.

A. And the case as far as Stricof and Polk, P.C., there would be a gain if liquidated at the value at which they appraise the practice.

Q. Why is that? Why would there by a gain on the value that you appraised the practice on, why would we have a gain?

A. First of all, the portion — that's the portion we represent the value of the practice per se would be subject to a capital gain and then again it would depend on the selling agreement. It would be subject to ordinary income but I took a conservative approach and only used the capital gain provision, the portion which represents receivables would be subject to ordinary income tax in liabilities paid.

Q. You mentioned both items?

A. I took each into account and calculated the potential tax to be $34,386.00 and if anything that tax would be larger not smaller.

Q. Okay, fine.

A. In the case of Van Buren, both properties —

Q. (Interposing) Meaning the operating company?

A. Yes, and the real estate company.

Q. Very good.

A. Mr. Stricof's potential tax on his share of both companies would be $41,817.00 if sold at year end '74.

(11) Q. And sold at the appraised balue?

A. Sold at the appraised value.

Q. If there was a different appraised value, the tax would be different?

A. Yes, indeed. If this were a higher value the tax would be higher.

Q. Based on your evaluation appraisal the tax is really probably as low as it could ever be?

A. That's correct, because the total of the gains is $75,655.00 which is taxable of which $70,008.00 is represented by a negative tax bases which Mr. Stricof has in these assets. Again that means they have already — a list of the assets reflects a credit of those taxes. Already this is something he personally had, whatever the assets are.

Q. Do you want to continue on?

A. I might say that the tax bases of negative 70008 means if Mr. Stricof were to sell Van Buren for nothing or one dollar, let us say, the taxable gain would still be $70,000.00 In the case of Frenchtown, the situation is worse with the tax bases negative $127,025.00. At my evaluation, the potential gain in $146,248.00 and the tax would be $59,062.00.

Q. The next item is Shelco.

A. Shelco, the Shelco sale was an installment sale that should (12) go together into — it means that each —

Q. (Interposing) If it has a bearing on how you arrived at the tax liability, does it?

A. Well, it does have a bearing on how I calculated the tax liability.

Q. Anything — you don't have to answer anything that has bearing — you may give the Court your opinion.

A. The Shelco, being the receivable, being representative of an installment sale, the proper way to calculate the taxable income is to determine the percentage profit on the sale in the original year in which it is made and then in succeeding years as principle payments are collected that same percentage of the principle payment represents taxable income to the holder and in this case that capital gains is subject to capital gains tax

Ordinary income, however, is based on the interest that is received from this receivable. I took all of that into account and calculated the tax on Shelco as $7,603.00. I went through the same type of calculations on the Greenfield Equity and there the tax is $3,392.00. In the case of Paint Creek, which I valued at zero, Mr. Stricof's tax bases is 9,000.

If he were to realize nothing he would have a loss of 9,000 and therefor the taxes, if any, would (13) be shown as a negative item of 3,150 which means a benefit to Mr. Stricof, taxwise, if he should relieve himself of P.C. at zero.

Regency Park with a negative tax bases of $98,579.00, which I valued at zero. Were Mr. Stricof to again, let's say, get out of that investment at zero, we would have a taxable gain of $98,579.00 which would result in a tax of $38,703.

In this case, as in the other cases, where some of the gain was subject to capital gains taxes and some ordinary income, I calculated — I took that into account in my calculations.

Q. Is it fair to say on all these items they have achieved tax benefits because of these depreciations?

A. Where we show negative tax bases, there's no question at all but that income has been sheltered in the past which has resulted in larger assets where whatever the assets are some of them must be attributable to their tax shelter. Big Rapids has a negative tax bases of $21,000.00.

Q. Let me ask you one question, isn't it true many times investors will purchase an asset without any idea of achieving any gain other than the tax shelter?

A. That has been true especially in the past.

(14) Q. So when you look at the assets the purpose of it could be profit, depreciation, tax shelter, they all have different purposes for investment?

A. True.

Q. Continue.

A. Big Rapids, I believe, was the next item with a negative tax bases of $21,000.00. Thus, there would be a gain of $21,000.00 at my evaluation — and the tax on that would be $8,100.00.

Texas International I valued at $1,100.00. That is Mr. Stricof's tax bases, therefore, there would be no gain or loss and no tax involved in a sale at that price.

The World Computer Company I valued at zero. Mr. Stricof's tax bases is $15,000.00. He would have that as a loss or for tax benefit and the tax benefit would be $6,548.00. His residence is valued at $64,000.00, has a tax bases of $50,000.00, and there would be a gain of $14,000.00 on which the tax would be $4,900.00. There are a lot of technicalities involved in that transfer of a residence which could be explored but I treated it as — strictly as a sale of the assets like any other asset for the purposes of calculating this potential tax liability.

Retirement Trusts, if Mr. Stricof were (15) to terminate the trust and obtain the money —

Q. (Interposing) Present value right now.

A. We would have a gain subject to an ordinary income of $3,562.00 and that would result in a tax of $891.00. I then, totaled all of the Federal Income Taxes and arrived a a total of $178,906.00 and then calculated the state income tax subject to — excuse me, the state income tax on the gains subject to ordinary income tax, and the state income tax on the gains subject to capital gains taxes.

I might indicate that as a result of the legislature recently raising the income tax that liability would be increased by an increase of seven tenths of a percent.

In any case I calculated it at the end '74 rate. That adds $3,682.00 and $2,380.00 to the potential tax liability for a total of $184,968.00.

Q. Then the appraisal of the assets and liability and so forth and the net worth of both as prepared by yourself, of Norman Stricof as of December 31, 1974 you show he has a net worth of, after your appraisal of the assets and adding the liability, of $150,869.00?

A. Correct.

Q. Getting back to Mr. Stricof and Polk. You have testified before that you have evaluated this accounting practice (16) based on a gross income of $267,000.00 a year?

A. Yes.

Q. And how did you arrive at that?

A. I examined IBM runs showing current billings.

Q. For the year 1975?

A. Well, no, current billing meaning as of up to the date as the IBM run was that Mr. Stricof had.

Q. What period?

A. That would be late in '74.

Q. Late '74? Okay.

A. I examined the actual — the run which represented the billings to his clients. I examined the runs which represent commissions from the clients, examine the information relating to the receivables that

had been billed, and also there is an IBM run which represented unbilled work.

Q. So there are really two aspects as a practice, the cleaning up of the old practice, is that right?

A. That's correct.

Q Okay, and the old practice had certain receivables from past experiences, right?

A. Right.

Q. That's the year coming in?

A. This specifically is the year '74. There's a lot of income on the cash receipts that can be attributed to the (17) receivables Mr. Stricof brought with him from the demerger which I referred to earlier from the demerger from the J. K. Lasser, New York Company.

Q. Like a capital payoff to him?

A. Yes.

Q. At the time of the merger he had to put receivables into a capital account?

A. At the time of the demerger he brought some receivables with him.

Q. That has nothing to do with the operation of his business right now?

A. Right, and that $280,000.00 figure, I took that into account.

Q. All right, now you had testified that you felt based on his business operations at a gross figure of $260,000.00 that now on unless business increases or decreases, if it stayed the way it is, as you have viewed it on the record, on the IBM printout, you came up to a summation that Mr. Stricof could realize about $36,000.00 a year, is that correct?

A. Yes, salary of $36,000.00 a year.

Q. Would you go through that gross figure of $260,000.00 and list those expenses that you found that

would be naturally against that income and show us how you arrived at that amount?

A. The first expense that I took into account would be six (18) staff men and their salaries, and I indicate that that figure is $110,000.00.

Q. It maybe there would be seven staff men?

A. I know that that varies, of course, depending on the volume.

Q. You are assuming that — you took his present expenses off his record?

A. Oh, yes, I examined his records and all these expenses I am going to mention are the result of my examination of actual records in Mr. Stricof's office.

Q. All right.

A. The secretarial wages I estimated one and a half girls, meaning one and a part-time girl.

Most of the time that I was there, there was one girl, but later there was another one hired. I put their combined salaries at $15,000.00 which means the total salary exclusive of Mr. Stricoff, would be $125,000.00. There is a retirement fund or a profit sharing fund that Mr. Stricof and Polk is a party to.

Mr. Schureman: Your Honor, again I observe the witness is referring to a memorandum. If I might be provided with a copy?

Mr. Bellinson: Of course.

The Court: All right.

Mr. Schureman: Thank you.

(19) A. (By the Witness, continuing): The contributions for the retirement fund including the $36,000.00 for the benefit of Mr. Stricof, based on the $36,000.00 salary, would be $16,100.00, ten percent of the total salaries paid.

Payroll taxes on the salaries would amount at the '74 rate to $7,800.00. This again, I may be conservative. I

notice the Michigan Unemployment Taxes have gone up more in several instances that I have knowledge of recently.

Insurance, general insurance that the practice would have to pay I estimated at $3,300.00 a year. The membership fees and other fees paid to the American Institute of Certified Public Accountants, $2,000.00.

There are seven, six or seven CPAs involved. Rent of $18,000.00, auto expenses of $4,800.00. Other expenses I didn't break down but I did examine past records of Mr. Stricof's practice and particularly as it was running currently.

Q. What would these others be? Car, entertainment?

A. No, you have postage, and the general expenses of running an office.

Q. From phone —

A. (Interposing) Phone, utilities of any kind.

Q. You have lumped them together?

(20) A. Into a $46,000.00 annual figure.

Q. When you lump them you took them into an actual figure?

A. Yes. And this brought the total figure to $224,000.00 before Mr. Stricof's salary and with a gross of 260 that allowed him to draw a salary of $36,000.00.

Q. Do you have an opinion as to Mr. Stricof, is this something that could come up or down? Could you give us an opinion?

A. I have an opinion as to trends. I believe the trend for a relatively small independent CPA practice is down because it in recent years, particularly, it has become increasingly difficult for such a man or such a partnership or profession to compete with what I consider his two principal competitors.

Those competitors are bookkeeping and tax services which are not subject to any body of professional ethics

or standards of workmanship and they offer a variety of relatively inexpensive services to businesses.

Q. Have you made an evaluation of Mr. Stricof's trends based on what he earned last year in the direction of his practice?

A. No, I consider Mr. Stricof's passed years earnings as not to be indicative of the future because his practice is new.

Q. As a matter of fact many of his former staff have broken off and gone out and taken business?

A. That's right, three of his former partners broke off and took with them relatively half of his former practice.

(21) Q. And I assume in this kind of practice where there are six CPA's it can happen again?

A. It happens frequently.

Q. Then it's incumbent upon the head partner or the owner to go out and get new business?

A. That's correct.

Q. What do you see a potential of Mr. Stricof replacing what he is losing?

A. It's increasingly difficult because he has this, let's say, relatively low priced competition from bookkeeping and tax services. Then he has very specificated competition from the larger CPA firms.

Q. As a matter of fact many accountants in practices are merging into larger firms for no reason?

A. Exactly.

Q. Isn't it true as to whether business —

Mr. Schureman: (Interposing) I'm going to object. I have been liberal.

Mr. Bellinson: I will object to his liberal — I don't think there's any evidence.

Mr. Schureman: The question is leading.

Mr. Bellinson: I'll rephrase the question.

(22) Q. (By Mr. Bellinson, continuing): You have an opinion based on the evaluation of Mr. Stricof's practice as to whether it lends itself to another merger?

A. It does not lend itself to such a merger. Most of — excuse me.

Let me rephrase that. The larger accounting firms that we're talking about, the national firms want audit accounts primarily. This was an audit account.

When you're called in usually at the end of the year, be it fiscal or calendar year of a company's operation to "audit their books and records" so that you can then issue an accountant's opinion as to whether their financial statement which their controller or treasurer has prepared presents fairly the results of the operation of that firm to the period in question and present fairly and the balance sheet presents fairly the financial position of that company as of the date in question that it's audited.

Q. And isn't it fair to say when a individual CPA does merge into a larger firm, they, in a sense, give autonomy —

A. Well, that's right. That's the part and parcel of the merger.

Q. Isn't that part of the problem with his practice, he can't give up autonomy because he's hooked into the accounts?

A. That's true with the way Mr. Stricof's practice has developed, each staff man that handles an account is almost an integral (23) part of that client and to wrench him away and put someone else in his place would be — well, I believe the staff men would leave and form their own firm taking with them these accounts.

Q. Do you know how old Mr. Stricof is?

A. Yes, I do.

Q. How old is he?

A. I have to look it up. He is — I used to have his age. He's about 48 or 49 at the moment.

Q. Is it fair to say that finally you sort of arrived at the business you had?

A. I would agree with that.

Mr. Schureman: Your Honor —

Mr. Bellinson: (Interposing) I'll withdraw the question.

The Court: The question has been withdrawn.

Mr. Bellinson: Okay. You may cross examine.

Cross Examination

* * *

By Mr. Schureman: (31) Q. All right, now have you been provided with an operating statement of the P.C. for the period from May 31st of '74 up to a recent date?

A. I only glanced at that during the recess. I didn't have it at the time I did this appraisal.

Q. Do you have a copy of it there?

A. No, I don't.

Q. All right, your projection, however, — your projection for the list of things projected for the future were made absent the available statements for the period from the end of that fiscal year up to the present time?

A. They were made based on the most current information I had which was through, I believe, November of '74 and in some cases of December billings.

Q. All right, now if you had a copy of your memorandum in which projection anticipated deferred income taxes — do you have that at hand?

A. Yes, I do.

Q. Page number 16, at the bottom. The conclusion that you reached or contained there is the total deferred income tax is $184,968.00, is that correct?

A. Yes.

(32) Q. You have calculated those taxes by presuming certain things, have you not?

A. Yes, tax, right.

Q. All right, may I ask you on the bases of what gross earned income have you based those tax projections?

A. Not a figure of earned income but rather a tax bracket of 50 percent.

Q. That being the maximum on earned income?

A. That's right.

Q. On the basis of how much of the deductions have you predicated that projection?

A. I am looking to my exact statement on that. I notice that I used a '74 rate and again in doing such to answer your question as fully as I can, in doing such a calculation —

Q. (Interposing) Excuse me, can you tell us the amount that you had plugged into the tax as deductions allowable?

A. That wouldn't be a pertinent factor except if you considered that — let me put it another way.

Q. May I suggest you can't answer the question?

A. I can answer the question.

Q. What figure did you use?

A. I used a normal expected standard deductions.

Q. How much?

(33) A. I would have to refer to all of my notes to get that figure.

Q. Then you used an absolute number, did you not?

A. I'm not sure, but if I did it's inconsequential.

Q. I'll ask you this. What amount did you use in your calculations and projections for income shelters?

A. The amounts indicated by the income shelters that Mr. Stricof has.

Q. And what is that amount, sir?

A. The various amounts?

Q. All that we have discussed this morning? How much does he have in shelters in terms of dollars?

A. I don't know the answer to your question. I could add up all the various things by how much in any given year — or do you mean if all were sold at the end of one year? Your questions are not clear to me.

Q. Well, I don't want to misstate your statement but I believe the purpose of your testimony was to attempt to demonstrate that Mr. Stricof will be confronted with certain taxes, income taxes, that he will in any event have to meet over the years?

A. That's right. All right, I can answer your question.

Q. And it is your testimony that he is going to have to pay $184,068.00? Yes or no?

A. There is no yes or no answer to that. It's as a given date (34) and time.

Mr. Bellinson: I would like to raise an objection. I don't think that evaluating the business —

Q. (By Mr. Schureman, continuing): I don't understand the word symbiotic. I guess it means reliance on — by the same token in calculating his taxes, isn't it symbiotic he has certain deductions —

A. (Interposint) No, I am afraid — if I may explain?

Q. Your answer is no?

A. No, my answer is not no.

Q. Have you had available to you Mr. Stricof —

Mr. Bellinson: (Interposing) Wait a minute, Your Honor, I'm going to object. He's throwing out these questions and doesn't let him answer and then proceeds to something else. I don't think that's proper.

Mr. Schureman: You'll have a chance to redirect if you're dissatisfied with the record.

Mr. Bellinson: I don't think you can cut him off without an answer. I think the man has the right to answer your question.

Mr. Schureman: I don't believe he has a right to volunteer answers that are not responsive (35) to my questions. Let me withdraw the last question.

Mr. Bellinson: Fine.

The Court: The question has been withdrawn.

Q. (By Mr. Schureman, continuing): Have you had a chance to pursue Mr. Stricof's most recent personal income tax returns?

A. What year is that?

Q. For the calendar year of 1973?

A. Yes.

Q. Do you have it there?

A. No.

Q. Do you have a recollection as to the approximate amount of deductions he had for a tax sheltered income?

A. No.

Q. May I ask you a hypothetical. If in the future he has similiar amounts of sheltered income isn't that going to affect the amount of money he's going to pay out in income taxes?

A. Would you mind restating the question? (Whereupon the last question was read back by the court reporter.)

A. My answer to that would be tax shelters will always shelter taxable income.

(36) Q. All right, so that you have not gotten any effect to that possibility in your projection?

A. That's incorrect. The way you just said my answer to your question — that's what you stated. It wasn't a question. You stated a fact and I said that the fact you stated was incorrect.

Q. In what respect?

A. Because this schedule of deferred income tax is a schedule as of a given date, the year end 1974. It shows the tax that would actually have had to have been paid as of that time in one given point of time if Mr. Stricof had to liquidate these assets.

Q. And he didn't have to do it, did he? If we're valuing these assets and a similiar schedule would have to be prepared as of the date — all that is predicated on the notion if there is going to occur a taxable event with reference to many of those assets?

A. Yes.

Q. And the taxable event you envision in most of these instances, on that sheet, is the sale of that asset; isn't that true?

A. Or transferred, that's right.

Q. Let's see if I may go backwards here. Let'a take a look at the residence. I suppose Mr. Stricof advised you that the cost of that house (37) was $50,000.00?

A. Yes, he did.

Q. The tax bases of the house, and I presume that's correct. How much did he tell you there was in improvements?

A. I took that to mean it included improvements.

Q Did he say that? Did you ask him?

Mr. Bellinson: We have stipulated to that. Do you want to go against the stipulation? I object. We stipulated to the value. Are you withdrawing that —

Mr. Schureman: No, I am not.

Mr. Bellinson: We have stipulated to that value.

Mr. Schureman: I'm trying to demonstrate that I believe that it is a false assumption that there will be certain tax liabilities incurred which tax liablilities are going to reduce the net worth of the marriage.

Mr. Bellinson: You can do that but don't go into the stipulated valuation.

Mr. Schureman: I'll withdraw any reference to that, if that worries you.

The Court: It's been withdrawn — the question.

Q. (By Mr. Schureman, continuing): Mr. Lefko, you take the (38) position there's a $14,000.00 tax liability that Mr. Stricof is going to have to deal with?

A. Correct.

Mr. Bellinson: I object, it's not fourteen, it's forty-nine hundred. Let's be careful with the figures.

Mr. Schureman: He answered the question.

Q. (By Mr. Schureman, continuing): You're saying there's a forty-nine hundred dollar tax and you're basing that on a $14,000.00 gain?

A. You're right. (Whereupon a discussion was held off the record.)

Mr. Bellinson: Let's go back on the record.

Q. (By Mr. Schureman, continuing): All right, the presumption you have intended in this is if there is going to be a sale of that residence to a third party, correct? That there will be a taxable sale?

A. That's the presumption.

Q. It's based, the presumption is based that there will be a sale to a third party, yes?

A. Well, I am thinking you're putting some pretty complicated (39) tax questions to me. There are books written on the treatment of residences and divorces et

cetera, and running through my mind are all of the principles you can base — they are very complicated.

Mr. Bellinson: I object to the line of questioning. It's been established that an appraisal of the value of any item is based on what it's worth, not it's value just because we're in a divorce case. It's what it's worth when it's sold. I object to trying to segregate that. It is an essential element from valuation and nothing in a hypothetical situation —

The Court: (Interposing): Let me ask you a question. Well, you may ask your question.

Q. (By Mr. Schureman, continuing): Mr. Lefko, the forty-nine hundred dollars incipient tax liability that you fastened to Mr. Stricof on the residence is based on the idea that there would be a sale of that residence to some third party, correct?

A. It's based on the idea that there would be a taxable sale of that residence.

Q. Your figure would not be forty-nine hundred dollars if there were a transfer by Mr. Stricof of an undivided one-half interest to Mrs. Stricof?

(4) A. I'm not certain of that.

Q. Is it your testimony there would still be a forty-nine hundred dollar tax liability fastened to Mr. Stricof if he conveyed his undivided tax to Mrs. Stricof?

Mr. Bellinson: Again, I object. Valuations are not based on that incidence. The valuations are based on the value of that item.

Mr. Schureman: What is your objection?

The Court: I think the question is proper and we should get an answer.

A. (By the Witness, continuing): No, in the case of a transfer such as you mentioned, at the most there would be half of that tax liability.

Q. In an inter-spousal transfer, you would divide it in half, a residence?

A. Yes.

Q. Okay, all right.

Mr. Bellinson: Well, again, I'm going to object because we're basically —

The Court: (Interposing): The question has been asked and answered.

Q. (By Mr. Schureman, continuing): If you move up one item on that page, World Computer. If I understand your computations, sir, there is a tax benefit?

(41) A. That's right.

Q. To Mr. Stricof if there's a taxable event?

A. Correct.

Q. And that tax benefit would be $6,548.00?

A. Right.

Q. A taxable event would be a transfer by Mr. Stricof to Mrs. Stricof, would it not?

A. My problem in answering questions of that sort is the fact there is cases —

Mr. Bellinson: (Interposing): I will have to object. It's immaterial. We're evaluating again, Your Honor, before you rule on a similiar question, we're evaluating assets. We're not evaluating the asset base on inter-spousal transfers. That is a subsequent item to the material and immaterial to what we're pursuing here.

The Court: But it could be material.

Mr. Bellinson: But right now we're evaluating assets.

The Court: I understand. I think the question should remain.

Q. (By Mr. Schureman, continuing): Go up one. Texas International, what is that?

A. You're forgetting World Computer now.

Q. I'm finished with World Computer.

(42) A. Texas International is an investment in what would c nmonly be called a hope for tax shelter.

Q. If I understand your analysis, there will be no tax consequences adverse or favorable to Mr. Stricof if this would be transferred?

A. Giving to assumptions that his tax basis is eleven hundred dollars and he sells that eleven hundred dollars, there would be no tax.

Q. Going, please, to Paint Creek, that's the golf course, right?

A. Yes.

Q. And that is a Michigan co-partnership?

A. I would have to look that up but to the best of my recollection, yes it is a Michigan co-partnership but to be certain of that I could refer to my work sheet.

Q. You, I presume, read this revision to each of these assets of the underlying document such as partnership agreement?

A. Yes.

Q. So, can you refresh my memory, is there a Buy-Sell Agreement in Paint Creek?

A. There is none.

Q. So far as you know there are no restrictions on the alienation of Mr. Stricof's interest as far as you know?

(43) A. I believe that Mr. Stricof is liable on the land contract which is involved in the Paint Creek co-partnership.

Q. I don't think you understand the question. As far as you know and unlike his interest in VanBuren and Frenchtown, there are no restrictions in the underlying partnership agreement on the alienation of his interests?

A. As far as I know that's true.

Q. The conclusion that you reached in your memorandum is that a transfer of Mr. Stricof's interest in Paint Creek would result in a tax benefit to him of $3,150.00, ture of false?

A. True.

Q. Now go up one, please, sir, to Greenfield. That's a short we're using. What's the normal name of that?

A. I call it the equity, the Greenfield Equity, because there's a land contract receivable and mortgage payable involved.

Q. Mr. Stricof's interest then is represented by a land contract vendee's interest, is that correct?

A. That's right.

Q. Now I surmise from your note here if Mr. Stricof were to sell that asset, that would trigger a tax liability of $3,392.00, is that right?

A. That's correct.

Q. Is his interest in the Greenfield land contract held by him (44) with or without Mrs. Stricof?

A. I don't remember.

Q. Have you seen the underlying contract?

A. Yes.

Q. You don't recall?

A. I can't recall.

Q. If, in fact, it were held by the parties in their joint names, wouldn't we have the same consequence of dividing that in half, that tax liability in half, with the residence?

A. I was attempting to list a net worth of the two of them, the parties, and therefore the tax liability would be as stated in my schedule.

Q. But if, in fact, she's on the land contract, you would have to cut that in half in an inter-spousal transfer?

A. You're talking about a transfer and if she, in fact, is half owner of that?

Q. Yes, sir.

A. Let me think a moment. If it's adjudicated she actually already owns half and only half would be transferred then I agree that the tax benefit to Mr. Stricof would be cut in half thus — that's enough.

Q. Now, you're a certified public accountant?

A. Yes, sir.

(45) Q. And consider that you have some knowledge of the laws of the state with respect to the practices of public accounting. It is a fact that a layman cannot be an owner of an interest in a public accounting firm, isn't that true?

A. That's true.

Q. Therefore under no circumstances could the Court award to Mrs. Stricof or could Mr. Stricof by agreement convey any interest in his public accounting firm to her, true?

A. True.

Q. You have suggested there would be a tax on the transfer or sale of his interest in the professional corporation of $34,386.00, true?

A. That's correct.

Q. So that you will have to base that on the hypothetical there would be a sale of his interest to an accountant or an accounting firm not a layman, true?

A. True.

Q. You have also testified so far as you're concerned that — I don't want to overstate things — things are bad for his future, nobody would be interested in buying it?

* * *

(55) Mr. Schureman: Thank you, Your Honor.

Q. (By Mr. Schureman, continuing): Did you examine the ownership, that is to say, who those securities are held — whether they are held by Mr. Stricof as an individual or jointly with his wife?

A. No, I didn't, it wasn't pertinent to what I did.

Q. Well, what you did was to calculate a prospective tax on the figures of some of these securities?

A. That's correct.

Q. And you concluded there would be a tax of $10,250.00, did you not, and that liability is listed under a statement of (56) net worth, entitled Norman and Lorraine Stricof?

A. That's true.

Q. Would it have your opinion as to the amount of taxes that would have to be paid if the securities, or some of them, were in their joint names and the transfer again was inter-spousal?

A. Well, it wouldn't have what I had here. If you're asking me if the tax consequences would be different, they might be.

Q. Fine. And you have stated what you envision the tax consequences to be in the happening of a taxable event?

A. Correct.

Q. And it's a taxable event when there's a transfer from Mr. Stricof to Mrs. Stricof?

A. Yes.

Q. Yes.

A. Now you're asking me to discuss quite a few —

Q. (Interposing): No, I am not. There will not be a difference in the tax liability that you have stated if these are jointly held securities and they are transferred from Mr. Stricof to Mrs. Stricof?

A. It would depend on how they came to be jointly held securities. The question can't be answered. It's relevant as to whether or not the stocks are in joint names or Mrs. Stricof's sole name but not to what I did in my statement of net worth.

(57) Q. In any case you can't tell us what stocks are in joint names or those in his sole name?

A. If we were not at this point on discussing a property settlement and with listed securities as assets to be transferred then I could answer your question.

Mr. Schureman: I'm sorry, I don't think his answer is responsive.

The Court: Do you understand the question?

Mr. Bellinson: What was the last question?

Q. (By Mr. Schureman, continuing): I am not asking an amount, I am asking if there would be a difference?

A. Now that's my problem. There are two questions there. One you asked is would there be a change in the amount of tax liability that I stated in my report and my answer is no. Secondly, you said in the case of a property settlement in which case —

Q. (Interposing): I never used that expression. I have not used that.

A. You said, I believe, if Mr. Stricof transferred to his wife a jointly held security, would that — would the tax liability necessarily be what I have stated here and I would guess that the tax liability would be necessarily be what I have stated (58) here.

Q. Thank you.

A. Again, it would depend on factors that we don't know at this point. How, for example, how they became to be jointly held.

Q. Summarizing this sheet and you used an absolute number, Mr. Lefko, you have used a number of $184,968.00, right?

A. Right.

Q. Is it a fact that depending on what happens to those assets, that that figure has no validity, isn't that true?

A. Depending on what happens to those assets?

Q. Yes, sir; isn't that a fact?

A. I can't answer your question. If you could elaborate I think I could answer better.

Q. We have gone over each one of these rather painfully and I have suggested there were certain things that can take place with respect to each asset and that it

depends on how much each asset — and I believe you have an amount shown for taxes which is going to vary depending on which of these events, if any, occur, right?

A. You have said so much I'd hate to say right now. If I could, I might repeat that what my schedule does show is the tax liability that would have — that Mr. Stricof would have (59) incurred as of December 31st, 1974 had those assets been sold as taxable events.

Q. This amount would not be the amount necessarily if certain other things occurred to these assets?

A. Right, there could be changes in the tax law, anything could happen.

Q. Aside from changes in the tax laws, there are other events that can take place that will affect this number, right?

A. No, I don't think events would take place. It's a matter of how these assets might possibly be transferred.

Q. Would you agree with this premise that the figure that you used of $184,000.00 is the worst that could happen to him?

A. No, because there are several instances —

Q. (Interposing): I would like the record —

Mr. Bellinson: (Interposing): Wait a minute.

The Court: You may finish the answer. You may finish the answer, go ahead.

A. (By the Witness, continuing): I'm sorry. In several instances which I guess I could recall I have indicated in earlier testimony I was conservative from the point of view that the liability would even be greater.

Q. Well, now you have based this on a point of time at the end of (60) December of '74?

A. Yes.

Q. Let me change my question. The conclusion that you drew of $184,968.00 in taxes was the worst that would have happened to him?

A. No, because again I took a viewpoint in some instances that had I not taken that viewpoint in some instances that had I not taken that viewpoint I could have easily justified a higher tax liability.

Q. Mr. Lefko, you were provided, I presume, with a schedule of the securities again by Mr. Stricof and each case you were provided with a date of acquisition, right?

A. I assume them all to be held at least more that six months and that would be the only pertinent fact to me in the engagement that I have.

Q. Did you ask him if he had all those for more than six months?

A. Yes.

Q. Prior to the end of December?

A. Yes, I recall asking.

Q. His answer was yes, is that right?

A. Yes.

Q. So that you have worked up an imaginary schedule E, is that correct?

A. A schedule E.

(61) Q. Yes. Yes, dealing with capital gains and losses, is that what you did, to figure out what the net result of a sale of all of these would have been?

A. Well I merely listed the cost and the value deducted sales, commissions on the sale, and came out with — wait a minute. There are two questions again.

Q. Isn't that what you do when you make up a schedule D?

A. I meant to say D. Would you mind repeating the question?

Q. When you came up with the figures here —

A. (Interposing): Which figures are you referring to, the figures referring to marketable securities?

Q. Referring to the tax liability. Well, you put down a value, getting back to that.

A. The values, okay.

Q. You said these securities were $52,292.00 as of December 31 of '74?

A. Yes.

Q. Okay.

A. Right.

Q. Now in arriving at that figure you reduced this sale in market value of some number?

A. Yes.

Q. And those numbers included what it could cost to sell them?

(62) A. Yes.

Q. And what it would cost for any capital gains taxes?

A. No.

Q. You didn't?

A. Not at that point. The capital gains taxes are included in another schedule.

Q. Where would you look to find out the market values of each of these securities on that date?

A. Generally, Standard and Poor's.

* * *

(238) Q. Initially, Mr. Lefko, in light of that forecast, doesn't it seem to you that it would not make economic sense for him to have all the tax shelters because they will, if they continue as they are throwing off losses to him, that all of his income will be sheltered and then some?

A. It doesn't make economic sense. Too, at the time you are in a low income situation to invest in tax shelters.

Q. Speaking of his exercising tax shelters —

A. (Interposing): I have already read in existing tax shelters and maybe locked in in Mr. Stricof's case there

is not much you can do about it, can't pay taxes to get out.

Q. Can you transfer them to somebody else?

A. No, when you say transfer the tax shelters?

Q. Yes, sir, if you could sell it?

A. If you could sell it you are subject to taxes yourself on the sale.

Q. I may be —

A. (Interposing): It is uneconomic.

Q. Supposing there is a voluntary turnover to Mrs. Stricof; is that possible?

A. Well, when you say is it possible, there are so many things to be explained that I would rather not.

* * *

EXCERPTS OF PROCEEDINGS
MARCH 28, 1975

Re-direct Examination

* * *

(252) (By Mr. Bellinson): Q. There has been a great deal of talk about the great value of the tax shelter and the family and to either one of them (253) in this case, how long have these taxes benefited, generally?

A. I would put a limit of somewhere between seven and ten years, the normal tax shelter I have investigated.

Q. Is there one period when you have a greater shelter and then a lesser period?

A. The earlier years afford the base that gives you cash flow, in the early years.

Q. And, in your opinion as to what the status of the shelters are on these assets you have testified to?

A. Yes, in most cases I would say that the earlier years have been listed there and they are now entering a period where the shelter should be left.

Q. They don't have anywhere near the value they had the first year?

A. That's correct.

Q. And, what happens when you get the benefit of the shelter; what does the shelter do?

A. Well, once you have gotten the benefit of the shelter you hope that one of two things will happen, either it proves to be an economic investment, an investment with a good economic profit. You realize, profits are taxable, profits may be even let us say that you have a negative tax situation which you are paying more taxes then on a normal situation.

Q. What you are saying, you have to pay the piper?

(254) A. That's right.

Q. Tell us how you pay the piper here?

A. Having — let us just take any one item for example, the most rapid depreciation that you can personally do under the internal revenue, there could come a time when you have no more depreciation or very little at that time you show larger than normal taxable profit, larger that normal taxes inhibit your tax flow, you have to pay Uncle Sam instead of using the money yourself.

Q. As a matter of fact, the tax shelter can be a liability?

A. At that point it is.

Q. This family has benefited greatly in their asset structure from the use of these tax shelters?

A. No question about that, it was demonstrated by looking at the taxable year of '73, to be exact.

Q. And, what would happen as far as these businesses, these tax shelters in the event of foreclosure and repossession; what then occurs?

A. They recapture almost, if not all, of the benefits that had previously been enjoyed due to the tax shelter characteristics of the investment.

Q. By that you mean what would happen to him?

A. Right now you would realize taxable income and you would have to pay in most cases ordinary income tax rates on that (254) gain.

Q. Just to be specific, let's say one VanBuren went into the receivers, personal liability on the mortgage, what would happen as far as cash flow; what would he have to pay on it?

A. There is a difference between foreclosure and — oh, what is the other legal term, there are various things that can happen in a case that you have described.

Q. Repossession?

A. Repossession, thank you.

Q. Okay. What would happen say over one year, what would he have to pay back to the government?

A. Let me look at my schedule. In the case of VanBuren his tax liability or their tax liability would be in the neighborhood of forty-one, forty-two thousand dollars.

Q. In other words, if VanBuren went out next year he has to come up with forty-two thousand dollars?

A. That's right.

Q. That's more than you project his income is?

A. That's right.

Q. Mr. Schureman has made some large furor, have you ever seen a sale of Mr. Stricof's practice?

A. No, there wasn't a sale.

* * *

Re-cross Examination

* * *

(265) (By Mr. Schureman): Q. My question is, you are not suggesting that they are going to lose their subchapter S status?

A. Yes, I am, see, there is a danger they could lose it.

Q. Would you please give us substantial authority?

A. My general knowledge of subchapter S and their problem leads me to make that statement.

Q. Can you give me a citation of authority for the proposition who would participate in money paid to her husband sent to her in the future, how would that

arrangement cause the corporation to lose its subchapter S status?

A. I can't give you a situation, now, I would have to be given time to research the problem.

Q. Have you ever seen it happen?

A. No, I have not.

Q. You testified, I think, that with respect to tax shelter type investments that in the early years that the primary benefit to the investor is that it throws off losses, not necessarily economic losses?

A. Um-hmm.

Q. So, that in the early years I think you said eight to twelve years?

A. No, I didn't characterize early years by a number of years, but I said that these benefits would generally end in the seventh to the tenth year.

Q. That is the benefits in the early years?

A. That is a benefit without cash flow, it's not good.

(267) Q. And, I think you said that this, in response to a direct question from Mr. Bellinson, that this is a benefit that this family has had in the earlier years of these tax shelters investments; isn't that so?

A. Well, that is so, they filed joint tax returns.

Q. And, the benefits, taking it the next step in as much as he had sheltered income he can go out and invest the money for the family; isn't that what your impression was?

A. I don't know what he had done with the income that was sheltered, specifically, if he had wanted to in any given year that he wanted a cash flow he could have made an additional investment.

Q. Well let me state it in another way. I think the implication of your testimony was that this particular family, the Stricofs, have benefited from these tax shelter investments because they have had available to him

income that was exonerated from federal income taxes; is that true?

A. That's true.

Q. You have said that as time goes by that the tax shelter investment takes on another value, hopefully, which is that it will actually start paying out amounts in cash?

Mr. Bellinson: I object, I don't remember that testimony.

Q. (By Mr. Schureman, continuing) Well, I will ask you if that (268) is not so?

A. No, that is not so.

Q. Is it hoped that when you invest in this type of investment at some future date there will be cash flow?

A. It is reversed, Mr. Schureman, the cash flow hopefully comes in the beginning and it is protected by the tax shelter as set by the investment.

Q. What happens later if you hopefully have a good economic investment that you put your money into?

A. It may later be profit.

Q. That's what I am trying to get out.

A. But, you said something about cash flow?

Q. Profitable in what way?

A. Profitable — that profit is not — not only not protected in normal sense by depreciation charges and so on, it is reserved, whatever profit is earned by this good economic investment it is protected, therefore, causing a longer that normal tax in later years.

Q. Stated very simply, you get income out but it is subject to ordinary tax rates, right?

A. Worse than ordinary rates.

Q. But, you do get benefits in cash, hopefully, and ultimately the investment itself depreciates in value?

A. If we take all of our assumptions that the investment will (269) prove to be good economic

investment and does appreciate in value, well, really, you are answering your own question, it could appreciate.

Q. And, in fact, isn't this precisely what could happen to his interest in VanBuren and Frenchtown?

A. Could happen.

Q. So, it was paid for during the marriage, but the benefit may not accrue until later?

A. No, the benefits in the early years, in the tax shelter and tax low aspect.

Q. But, if it becomes a profitable venture benefits will accrue in the future?

A. That is possible, as I say.

Q. You have answered a good many questions and I think your position remains the same as it was, namely that you predict that Mr. Stricof's income in the future from his accounting practice will be something less than forty thousand dollars a year?

A. Correct.

Q. And, you are quite confident of that?

A. Yes.